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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a $5 million punitive damage award, which was imposed vicariously against petitioner for alleged fraud by its agent in connection with the sale of an insurance policy to punish and deter petitioner for conduct in Alabama and twelve other states and which is nearly 1,600 times respondent's economic damages, more than 20 times respondent's "mental anguish" damages, and 5000 times comparable statutory penalties, is a "grossly excessive" punishment that violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause prohibits the State of Alabama from using punitive damages either to punish Life of Georgia for transactions that occurred in other States or to deter Life of Georgia from engaging in transactions in other States in the future.

3. Whether the $5 million punitive damage award is duplicative, and therefore violates the Due Process Clause, because it is partially predicated on conduct that was previously punished by the $1 million punitive damage award affirmed in *Foster v. Life Insurance Company of Georgia*, 656 So. 2d 333 (Ala. 1994).

4. Whether the Alabama punitive damage system violates the Due Process Clause because it fails to provide fair notice of the conduct that will subject a person to punishment or of the severity of the penalty that the State may impose.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties in the court below are listed in the caption to this petition. Life Insurance Company of Georgia is wholly owned by ING America Life Corporation, which in turn is wholly owned by ING America Insurance Holdings, Inc. The latter is a holding company of insurance companies and is wholly owned by Internationale Nederlanden Groep N.V., a Netherlands corporation publicly traded on European stock markets.

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PETITION FOR WRIT OF CERTIORARI

Life Insurance Company of Georgia ("Life of Georgia") petitions this Court for a writ of certiorari to review the judgment in this case of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion on applications for rehearing of the Supreme Court of Alabama, released April 26, 1996, is reprinted at Appendix ("App.") 1a-77a, and has not yet been reported. The original opinion of the Supreme Court of Alabama is reprinted at App. 78a-146a, and is unreported. The Order of the trial court denying Life of Georgia's Motion For New Trial Or, In The Alternative, For JNOV Or, In The Alternative, For Remittitur, filed on October 19, 1994, is reprinted at App. 147a-154a, and is unreported.

JURISDICTION

The Supreme Court of Alabama released its initial opinion and judgment in this case on November 17, 1995. Both Life of Georgia and respondent filed timely applications for rehearing. On April 26, 1996, the Supreme Court of Alabama granted the applications for rehearing, withdrew the earlier opinion and substituted a new opinion and judgment. This petition has been filed within 90 days of the release of the opinion and judgment on applications for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Factual Background

Like a number of insurance companies, Life of Georgia offered customers who are eligible for the federal Medicare program a "Medicare Supplement" policy. Such a policy was designed to provide insurance to Medicare recipients for medical expenses that are not covered by Medicare. The policy provided important protection for tens of thousands older Americans who otherwise would have had to pay uncovered expenses out of their own pockets. A Medicare Supplement policy was not necessary, however, for individuals who were eligible for Medicaid as well as Medicare -- so-called "dual eligibles" -- because Medicaid provides those individuals with benefits similar (although not identical) to those of the Medicare Supplement policy.

Life of Georgia had an explicit company rule against selling Medicare Supplement policies to dual eligibles. *E.g.*, Tr. 285. Consequently, the standard application for Medicare Supplement insurance specifically asked whether the applicant was eligible for Medicaid. *See* Tr. 451. Life of Georgia agents were trained that they could not sell the Medicare Supplement policy to any individual who answered "yes" to that question. *E.g.*, Tr. 441. The company's policy specified that if a Medicare Supplement policy were sold to a dual eligible, any premiums paid would be returned. Moreover, the agent who sold the policy would lose any commissions received from the sale. *E.g.*, Tr. 105; 333; 348; 378.

In 1990, Life of Georgia agent Barbara Holt sold respondent Daisey L. Johnson a Life of Georgia Medicare Supplement policy that respondent did not need due to her eligibility for Medicaid. Although respondent apparently was eligible for Medicaid benefits at the time she bought the policy, Tr. 39, the application submitted to Life of Georgia stated that she was not eligible for Medicaid assistance, *see* Tr. 451.

B. Proceeding In The Courts Below

In 1993, respondent sued Life of Georgia, seeking compensatory and punitive damages and claiming that the company committed the torts of fraud and fraudulent suppression in connection with Ms. Holt's sale of the Medicare Supplement policy to respondent. In its answer, Life of Georgia denied respondent's allegations and objected that the imposition of punitive damages would violate the Due Process Clause of the Fourteenth Amendment. *See* App. at 155a-157a.

At trial, respondent's lawyers focused the jury's attention largely on Life of Georgia's purported conduct -- or potential future conduct -- with respect to dual-eligible individuals who resided in twelve other States, and asked the jury to punish

Life of Georgia on that basis. Over Life of Georgia's objection, respondent introduced evidence purporting to show that Life of Georgia had sold unneeded Medicare Supplement policies to three other individuals. Two of these individuals resided in Florida. Tr. 43; 52. The only other Alabama resident who testified that she had purchased such a policy -- Ms. Mattie Foster -- had been represented by respondent's lawyers in an earlier action against Life of Georgia in which a jury imposed a $1 million punitive damage award against the company. *Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (Ala. 1994). *See* Tr. 60-62. The finding of liability and imposition of punitive damages in *Foster* came well *after* the conduct at issue here had occurred.

In closing argument, respondent's counsel urged that the jury punish Life of Georgia by giving respondent "a hundred dollars for each" dual-eligible person in Alabama *and in the other twelve States* in which Life of Georgia sold Medicare Supplement policies, regardless whether Life of Georgia ever had actually sold or even attempted to sell an insurance policy to any of those individuals.[1] Thus, respondent asked the jury

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[1] Respondent's counsel asserted that there were 116,025 people in Alabama alone "that are possible purchasers of this Medicare supplement policy that don't need it," and argued:

> We're going to ask you for the hundred and sixteen thousand twenty-five people, we're going to ask you to remind them of those people, and give a hundred dollars for each one of them. Ladies and gentlemen, that makes one million one hundred and sixty thousand two hundred and fifty [sic].
>
> Now, they do business in thirteen states, ladies and gentlemen. . . . We're going to ask you, ladies and gentlemen, to return a verdict for all thirteen states which comes to fifteen million eighty-three thousand two hundred and fifty.

to punish Life of Georgia based on the mere possibility that it might have transacted -- or might someday consider transacting -- business with residents of other States who had no discernible connection to Alabama.

The jury substantially complied with that request. After a three-day trial, it returned a punitive damage verdict of $15 million, along with compensatory damages of $250,000, which were intended to remedy Ms. Johnson's $3,132 out-of-pocket loss -- the total amount of premiums she had paid over a three-year period -- plus the mental anguish that Ms. Johnson allegedly suffered upon learning that she had purchased an insurance policy that she did not need.

In its post-trial motions, Life of Georgia argued, among other things, that the $15 million punitive damage award violated the Due Process Clause. *See* App. at 159a-170a. The trial court remitted the punitive damage award to $12.5 million, basing that figure on the highest punitive damage award for fraud upheld by the Alabama Supreme Court. It otherwise left the verdict intact. *See* App. at 152a-154a.

Life of Georgia appealed to the Supreme Court of Alabama, contending that the $12.5 million remitted punitive damage award violated the Due Process Clause. App. at

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Tr. 520-21. Respondent's counsel apparently arrived at the requested figure of $15,083,250 by multiplying his request for Alabama, $1,160,250, times thirteen states in which Life of Georgia does business. Respondent's counsel had offered a preview of this argument in his opening statement, telling the jury that "we're going to ask you . . . to award a substantial verdict against Life Insurance Company of Georgia for punitive damages to punish them for this type of conduct and to prevent them from doing it to the other Daisey Johnsons of the State of Alabama and Florida and Mississippi, and people situated such as her." Tr. 14.

171a-181a. On November 17, 1995, that court issued its initial opinion. App. at 78a-146a. The court further reduced the punitive damage award to $5 million,[2] but otherwise rejected Life of Georgia's argument that the "award of punitive damages is grossly excessive and fundamentally unfair and therefore contravenes . . . the Due Process Clause of the Fourteenth Amendment." *Id.* at 88a. The court also announced a number of prospective changes to the Alabama punitive damage system to address Life of Georgia's federal due process argument that "under Alabama law, juries are provided too few standards" for imposing punitive damages, *id.*, and that the Alabama system is otherwise an arbitrary and capricious punishment regime that violates the Due Process Clause, *id.* at 102a-112a.

Justice Maddox dissented in part. He urged, *inter alia*, that the Alabama Supreme Court should have awaited this Court's decision in *BMW* before issuing its decision in this case, because *BMW* "contains some of the same legal questions that are present here, or similar ones." *App.* at 122a.

Life of Georgia filed an Application for Rehearing, contending that the remaining $5 million punitive damage award violated the Due Process Clause and arguing that, at the very least, it was entitled to the benefits of the supposed procedural reforms that the Alabama court had announced to remedy the Alabama system's defects. On April 26, 1996, the Alabama Supreme Court withdrew its November 17, 1995, opinion and released a new opinion. The court's April 26 opinion made a few changes to the portion of the court's earlier opinion concerning new Alabama procedures, but

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[2] The court provided no basis for concluding that $5 million represented an appropriate award other than to say "[i]t is the opinion of this Court that $5 million is not excessive for punishment and deterrence specific to Life of Georgia, considering all of the facts of this case." App. at 113a.

refused to apply those procedures to Life of Georgia or to disturb its prior federal constitutional rulings. *See* App. at 38a-41a.

Life of Georgia filed an Application for Stay in the Alabama Supreme Court pending the filing and disposition of a petition for writ of certiorari in this Court. On May 20, while that Application was pending, but after the time for filing a second rehearing petition had expired, this Court decided *BMW*. Life of Georgia filed a supplemental memorandum in support of a stay, bringing the *BMW* decision to the Alabama Supreme Court's attention.

On May 29, 1996, the Alabama Supreme Court denied Life of Georgia's stay application. App. at 182a. Justice Maddox dissented from the denial of a stay, declaring that "Life of Georgia raises several constitutional claims that obviously have merit." *Id.* at 183a. "In *BMW*, the Supreme Court found that this Court did not exercise its discretion reasonably and that the constitutional protection of due process of law was not satisfied," Justice Maddox concluded. "I think that the Court is guilty once again." *Id.* at 186a.

Life of Georgia then filed an Emergency Application for Stay with Justice Kennedy, who granted that Application on July 1, 1996. No. A-1034.

REASONS FOR GRANTING THE WRIT

A. The Court, At The Very Least, Should Grant Certiorari, Vacate The Judgment And Remand This Case For Further Consideration In Light Of *BMW*.

This case presents important and substantial federal due process questions that are directly and materially affected by this Court's decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The $5 million punishment here is the product of the same Alabama punitive damage system

that resulted in the $2 million award struck down in *BMW*. The Alabama Supreme Court issued its judgment sustaining the $5 million punitive damage award before the decision in *BMW* and therefore did not consider *BMW* in reaching its judgment. Under such circumstances, this Court frequently grants certiorari, vacates the judgment and remands for reconsideration in light of the Court's intervening decision. *See Lawrence v. Chater*, 116 S. Ct. 604, 607 (1996) (GVR orders are appropriate where this Court's intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration."); *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964). Indeed, this Court already has granted certiorari, vacated the judgments below and remanded three similarly postured Alabama cases for further consideration in light of *BMW*.[3]

The Alabama Supreme Court's rulings concerning the unconstitutional excessiveness of the $5 million punitive damage award (Question 1) and the impermissible extraterritorial effect of that punishment (Question 2) clearly conflict with this Court's decision in *BMW*. For that reason alone, application of *BMW* is highly likely to change the result below and, at the very least, the Court should remand for reconsideration in light of *BMW*.

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[3] *See Union Sec. Life Ins. Co. v. Crocker*, No. 95-740, *g. v. r.*, 116 S. Ct. 1872 (1996); *American Pioneer Life Ins. Co. v. Williamson*, No. 95-1325, *g. v. r.*, 116 S. Ct. 1872 (1996); *Ford Motor Co. v. Sperau*, No. 95-771, *g. v. r.*, 116 S. Ct. 1843 (1996). Since *BMW*, the Court has denied certiorari in only one Alabama punitive damage case, *Schulte v. Smith*, No. 95-1477, *cert. denied*, 116 S. Ct. 1849 (1996), which involved a wrongful death claim and did not raise a due process excessiveness challenge to the punitive damage award.

1. Application of *BMW* will demonstrate that the $5 million punitive damage award is unconstitutionally excessive.

In *BMW*, this Court declared that when a particular punitive damage award is "grossly excessive" in relation to "the State's legitimate interests in punishment and deterrence," it enters "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 116 S. Ct. at 1595. In defining Alabama's legitimate interests in imposing punishment, the Court held that "a State may not impose sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States." *Id.* at 1597. Thus, the Court concluded that, in analyzing an Alabama punitive damage award for excessiveness under the Constitution, the award must be analyzed solely in light of conduct "that occurred in Alabama . . . with consideration given only to the interests of Alabama consumers, rather than those of the entire nation." *Id.* at 1598. The *BMW* Court also articulated "[t]hree guideposts" for deciding whether a particular punitive damage award is so grossly excessive that it violates the Due Process Clause.

The result in this case is bound to change if the Court remands and the Alabama Supreme Court faithfully applies the principles articulated in *BMW*. As a threshold matter, there is no indication that the court below excluded extraterritorial factors from its calculus when making its due process excessiveness ruling. Thus, like *BMW*, this case raises issues concerning a State's power to impose punitive damages to "changing the tortfeasors' lawful conduct in other States." *BMW*, 116 S. Ct. at 1597. In fact, this case presents an even more extreme example of that unconstitutional practice than was presented in *BMW*. Whereas in *BMW* Dr. Gore had asked the jury to punish BMW for its *actual* sales beyond Alabama's borders, respondent in this case obtained a punishment based on the *mere possibility* that Life of Georgia had done, or might someday do, business with hundreds of

thousands of residents in twelve other jurisdictions. Yet, unlike in *BMW*, the court below did not purport to "eschew[] reliance on . . . out-of-state conduct" or "base[] its remitted award solely on conduct that occurred within Alabama." *Id.* at 1598; *see Part A.2., also infra.*

A proper analysis of Alabama's constitutionally legitimate interests in punishment pursuant to the three *BMW* guideposts can lead to no other conclusion on remand than that the $5 million award here violates due process. With respect to the "reprehensibility" factor, *BMW*, 116 S. Ct. at 1599, the Alabama Supreme Court's opinion contains much rhetoric. But there is no evidence in the record to "establish the high degree of culpability that warrants a substantial punitive damage award." *Id.* at 1601. "To find to the contrary, . . . is to make 'reprehensibility' a concept without constraining force." *Id.* at 1606 (Breyer, J., concurring).

This case -- like *BMW* and the remanded Alabama cases -- involves a financial tort, not conduct "evinc[ing] . . . indifference to or reckless disregard for the health and safety of others." *BMW*, 116 S. Ct. at 1599. The conduct at issue here was not part of some intentional corporate profit-making scheme. In fact, Life of Georgia had a clear and definite company policy that *forbade* the selling of Medicare Supplement policies to Medicaid recipients, that punished agents who violated the policy and that required refunds to individuals who purchased unnecessary Medicare Supplement policies. *E.g.*, Tr. 86; 88-91; 165; 191; 285; 298-300; 333; 374-75; 378-79; 414. Out of tens of thousands of Medicare Supplement policies sold by Life of Georgia, the evidence at trial was that only ten had ever been sold -- whether intentionally or unintentionally -- in contravention of this policy, Tr. 263-64, and that *only two* such instances, including the sale in this case, occurred in Alabama, *see* Tr. 60-62; 212. And there is no dispute that the Medicare Supplement policy is a legitimate product that provides

important insurance benefits to individuals who are not covered by Medicaid.

Nor did the courts below justify the award on the ground that either Life of Georgia or its agent maliciously sought to deceive Ms. Johnson. Rather, the best the courts below could do was to find that there was sufficient evidence to have permitted the jury to conclude that the agent "knew *or should have known*" that Ms. Johnson did not need to purchase a Medicare Supplement policy. App. at 7a (emphasis added); 148a.[4]

The degree of reprehensibility is also substantially lessened by the fact that Life of Georgia itself committed no punishable tort; it is being held vicariously liable for the conduct of its agent. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) (distinguishing between defendant that acted with malice and "a case of negligence, strict liability, or *respondeat superior*"). There was no proof that Life of Georgia had any notice that its agent in this case had ever sold an unnecessary Medicare Supplement policy before she sold a policy to respondent. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (affirming vicarious liability of insurance company for punitive damage award of $840,000 where, "[b]efore the frauds . . . were effectuated, Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents").

While respondent's theory was that Life of Georgia deserved to be held vicariously liable for punishment because

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[4] The evidence at trial was conflicting as to whether Ms. Johnson told the sales agent that she was a Medicaid recipient. The agent testified that she did not. Tr. 426; 451; 454. Respondent gave conflicting testimony. Tr. 226; 246. There was no dispute that the sales agent asked Ms. Johnson whether she was on Medicaid. Tr. 226; 454.

it did not adequately train its agents regarding eligibility for Medicare Supplement policies, *see* App. 7a-8a, the agent who sold the policy to respondent testified that she knew that she could not sell it to individuals on Medicaid. Tr. 432; 441. Both the agent and respondent testified that the agent asked respondent whether she was on Medicaid. Tr. 226; 454. The disputed issue of fact was whether respondent answered that question in the affirmative. *Compare* Tr. 246 *with* Tr. 454. At any rate, the undisputed evidence was that the application submitted to Life of Georgia clearly told the company that respondent was *not* on Medicaid. *See* Tr. 451. Thus, like *BMW*, this case "exhibits none of the circumstances ordinarily associated with egregiously improper conduct." *BMW*, 116 S. Ct. at 1601.

The *BMW* proportionality analysis, which evaluates the ratio between punitive damages "and actual harm," *BMW*, 116 S. Ct. at 1601, likewise shows why the $5 million punitive damage award in this case is grossly excessive. The punitive damage award is 1,600 times respondent's economic loss of $3,132 -- more than triple the "breathtaking," 500 to 1 ratio of punitive to economic damage in *BMW*. It also is 20 times respondent's "mental anguish" damages of $246,868, which Life of Georgia argued below are themselves grossly excessive and are subject to even less judicial supervision in Alabama than punitive damages.[5] No matter what the

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[5] Life of Georgia argued below that the jury's apparent verdict for $246,868 in compensatory damages for mental anguish was itself grossly excessive. Although the Supreme Court of Alabama rejected that contention, it provided no explanation whatsoever as to why $246,868 – which is nearly 5 times the $50,000 mental anguish award affirmed against Life of Georgia in the prior *Foster* case – was a rational approximation of the harm to Ms. Johnson, observing simply that "[t]here [is no] yardstick to measure the amount of recompense that should be awarded for . . . mental suffering." App. at 10a (quotation omitted).

yardstick, the $5 million punitive damage award far exceeds the 4:1 ratio in *Haslip*, which was "close to the line," 499 U.S. at 23-24, and the 10:1 ratio considered acceptable in *TXO*, 509 U.S. at 459-62.[6]

The result is the same if Life of Georgia's potential profits, as opposed to respondent's losses, are used as a measure of excessiveness. The $5 million award dwarfs the profits that Life of Georgia earned from selling Medicare Supplement policies. Indeed, Professor James Barth, an economics expert, testified in a deposition admitted at the post-trial hearing that "given Medicare Supplement premiums in Alabama, it would take approximately *three hundred years* to earn the profits needed to recoup the fifteen-million-dollar punitive damage verdict." Deposition Testimony of James Barth at 42. Thus, even the remitted award represents a *century's worth* of Alabama profits from the line of insurance involved in this case.

"Comparing the punitive damage award and the civil and criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 116 S. Ct. at 1603. This is especially true here. For example, the maximum fine in Alabama for making "a false or fraudulent statement or representation . . . relative to[] an application for insurance," Ala. Code § 27-12-23, is $1,000. The $5 million punitive damage award is 5,000 times that amount.

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[6] The 10:1 ratio in *TXO* took into account the fact that the actual damages in that case did not amount to all the harm that likely *could* have resulted from the defendant's conduct. *See BMW*, 116 S. Ct. at 1602 ("[I]n upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded."). There is no doubt here that the jury's compensatory damage award fully encompassed all conceivable harm that could have resulted from Life of Georgia's conduct.

In short, application of the *BMW* due process framework will compel the conclusion "that the grossly excessive award imposed in this case transcends the constitutional limit." *BMW*, 116 S. Ct. at 1604. A GVR order is appropriate to allow the Alabama Supreme Court to perform such an analysis in the first instance.

2. Application of *BMW* will demonstrate that the $5 million punitive damage award is based on improper extraterritorial factors and therefore violates due process.

The invitation by respondent's counsel during closing arguments that the jury punish Life of Georgia for its actual or potential sales of insurance policies in the twelve States surrounding Alabama -- and the jury's acceptance of that invitation -- not only is relevant to the excessiveness question, but resulted in an exercise of power that plainly exceeded the State of Alabama's constitutional authority under *BMW*. This Court in *BMW* declared that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *BMW*, 116 S. Ct. at 1597-98.

Here, respondent explicitly asked the jury to punish Life of Georgia to protect consumers from other States who had no connection to Alabama. And, with the exception of two actual Life of Georgia customers from Florida, respondents did not even attempt to prove that Life of Georgia had acted unlawfully in any of those other States.

To be sure, the *BMW* Court did "not consider whether one State may properly attempt to change a tortfeasors' *unlawful* conduct in another State." *BMW*, 116 S. Ct. at 1598 n.20. But even assuming that changing unlawful conduct was the intention of respondent's counsel when he asked the jury to

punish Life of Georgia for its potential future out-of-state conduct, the Court's reasoning in *BMW* strongly suggests that the Due Process Clause prohibits such extraterritorial punishment. The same "principles of state sovereignty and comity," *id.* at 1597, that the Court invoked in *BMW* preclude one State from deciding the means and quantum of the punishment appropriate for unlawful conduct that has or might occur in some other State. To allow Alabama to reach outside its borders and adjudicate liability and decide the punishment in such cases manifestly "would be infringing on the policy choices of other States." *Id.* at 1597.

Indeed, "the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting *its own consumers* and *its own economy*." *BMW*, 116 S. Ct. at 1597 (emphasis added). Moreover, "the States need not, and in fact do not," protect consumers "in a uniform manner." *Id.* at 1596. Although "[s]ome States rely on the judicial process to formulate and enforce" consumer protections "by applying principles of contract and tort law," others "enact[] various forms of legislation." *Id.* The Alabama Supreme Court explicitly relied on purportedly weak regulation of insurance companies *in that State* as a justification for inflicting substantial punitive damage awards against insurance companies generally and against Life of Georgia here. App. at 16a; *id.* at 37a ("The practice . . . would never have been permitted in this state if the activities of insurance agents were properly regulated."). But the jury was asked to punish Life of Georgia based on the company's business activities in twelve neighboring States, not just in Alabama. These other States may have chosen to establish systems that seek to protect consumers through legislative and regulatory mechanisms, rather than the punitive damage mechanism that is so highly favored in Alabama. The rationale of *BMW* precludes Alabama from

using its punitive damage system to force its neighboring States to accept Alabama's policy choices concerning how to regulate the insurance industry. *See BMW*, 116 S. Ct. at 1604 ("While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

Accordingly, this case presents issues concerning extraterritorial punishment that are similar to, and flow directly from, the Court's decision in *BMW*. A GVR is warranted to permit the Alabama Supreme Court to reconsider these important issues in light of *BMW*.

B. The Court Should Grant Plenary Review To Decide Whether The Due Process Clause Prohibits A Company From Being Punished Repetitively For The Same Conduct.

Although the petitioner in *BMW* raised the issue of "multiple punitive awards stemming from the same alleged misconduct," the Court did not address that issue because "the question of multiple awards [wa]s hypothetical, not real," in that case. *BMW*, 116 S. Ct. at 1617 n.4 (Ginsburg, J., dissenting). But that question *is* present in this case. Life of Georgia was clearly subjected to punishment for conduct that already had been punished. Indeed, Ms. Foster, a prior plaintiff who had already obtained a $1 million punitive damage award based on similar allegations, *see Foster v. Life Ins. Co. of Ga.*, 656 So. 2d 333 (Ala. 1994), was allowed to testify at the trial of this case. Tr. 60-67. The support was mutual, as Ms. Johnson had testified at the post-trial hearing in Ms. Foster's case in order to provide justification for the punitive award in that case. *See* App. at 50a n.15. Thus, Life of Georgia was punished for *both* alleged torts in *each* case.

Numerous courts have wrestled with the problem of multiple punitive damage awards. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (en banc) (holding that $25

million in punitive damages awarded against an asbestos manufacturer should be reduced to $1 million on the ground that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation"), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993); *id.* at 1400, 1405 (Weis, J., dissenting) (arguing that *any* additional punishment violated due process); *id.* at 1405 (Becker, J., dissenting) (same); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle.").[7] In fact, in a concurrence to the *BMW* decision overturned by this Court, Justice Houston of the Alabama Supreme Court recognized that duplicative punitive damage awards pose "serious problems" of a constitutional nature. *BMW of North*

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[7] *See also, e.g., In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), *cert. denied*, 479 U.S. 852 and 479 U.S. 915 (1986); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1061 (D.N.J.), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989); *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act . . . because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1107 (1993) (expressing concern that "'if juries in several lawsuits are able to assess punitive damages against the same defendant for the same transaction, there is a danger of overkill'") (quoting *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970)).

America, Inc. v. Gore, 646 So. 2d 619, 630 (1994) (Houston, J., concurring), *rev'd*, 116 S. Ct. 1589 (1996). Justice Maddox made the same point in this case in his partial dissent below. App. at 50a-53a.

This case squarely and unambiguously presents a situation in which a defendant was punished on the basis of conduct for which it had already been punished. The Court should grant the writ and set this case for plenary consideration in order to provide guidance to the lower courts on this important and recurring question.

C. The Court Should Grant Plenary Review To Decide Whether The Alabama Punitive Damage System Violates Due Process Because It Lacks Standards And Procedures To Provide Fair Notice Of The Conduct That Will Subject A Person To Punishment Or Of The Severity Of The Penalty That The State May Impose.

The Court should grant review and decide whether, as a matter of procedural due process, the Alabama punitive damage system contains constitutionally adequate standards to constrain the discretion of juries and courts to inflict punishment. While this Court in *Haslip*, 499 U.S. at 1, upheld the Alabama system against constitutional attack, events since *Haslip* demonstrate that the system is arbitrary, capricious and fundamentally unfair. As three Justices of the Court found in *BMW*, "[t]he standards the Alabama courts applied here are vague and open-ended to the point where they risk arbitrary results. . . . [T]he standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results." *BMW*, 116 S. Ct. at 1605 (Breyer, J.,

concurring).[8] Moreover, while "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty," *id.* at 1598, Alabama law provides fair notice of neither.

The results in this case and the prior *Foster* case graphically illustrate the flaws in the Alabama system. In *Foster*, the punishment was $1 million; in this case the jury imposed $15 million, the trial judge changed it to $12.5 million, and the Alabama Supreme Court changed the punishment to $5 million with no meaningful explanation for its selection of that number. That such widely varying amounts of punishment could be imposed for the same conduct demonstrates convincingly that no person could possibly predict in advance the size of the fine that the State of Alabama will inflict for this particular alleged misconduct. Alabama's "legal standards offer virtually no constraint" against arbitrary and extreme punishments. *BMW*, 116 S. Ct. at 1609 (Breyer, J., concurring).

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[8] In support of its federal due process claims, Life of Georgia's expert witness, Professor George Priest of Yale Law School, testified that "[t]he punitive damage verdicts in Alabama within the last year and for several years before that are extraordinary in their magnitude and in their frequency. There is nothing like this that has been recorded, I think, in the history of American jurisprudence." Tr. 574. Based upon officially reported appellate decisions introduced during the post-trial proceedings, *see, e.g.*, App. at 69a-74a (appendix to concurring and dissenting opinion of Maddox, J., consisting of charts depicting data submitted by Life of Georgia), Professor Priest also testified that "punitive damage verdicts by juries in Alabama, and even after their remittitur, . . . are severely out of line in comparison with verdicts in neighboring States as well as across the country." Tr. 574.

The constitutionality of procedures that routinely produce unconstitutional results, as do Alabama's, deserves further consideration by this Court. Whether the Alabama procedures are constitutionally adequate is especially important because -- since *Haslip* -- courts across the country have used the Alabama procedures as the standard for assessing the constitutionality of punitive damage systems in other states. *See, e.g., Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994) (per curiam) (concluding that the California punitive damage system is comparable to the Alabama system as approved by *Haslip*); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) (upholding constitutionality of Texas punitive damage system after comparison to Alabama system), *cert. denied*, 503 U.S. 1011 (1992).

The Court should grant the writ to revisit the question whether the Alabama *system* violates due process and to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either remanded for further consideration by the Alabama Supreme Court in light of *BMW* or set for plenary consideration.

July 24, 1996

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

1940357

Life Insurance Company of Georgia

v.

Daisey L. Johnson

Appeal from Mobile Circuit Court
(CV-93-969)

On Applications for Rehearing

SHORES, JUSTICE.

The opinion released November 17, 1995, is withdrawn and the following is substituted therefor. The Court wishes to express its appreciation to counsel for the parties and to counsel for amici curiae for the excellent briefs filed in support of the applications for rehearing. The Court has been aided and persuaded by the excellent and well-reasoned arguments advanced by both the parties and the amici curiae.

Daisey L. Johnson sued Life Insurance Company of Georgia ("Life of Georgia"), alleging that it had engaged in intentional and reckless fraud and fraudulent suppression by selling her a Medicare supplement insurance policy that was worthless to her because she was eligible for Medicaid. The jury returned a verdict in favor of Ms. Johnson, assessing compensatory damages at $250,000 and punitive damages at $15 million. Life of Georgia moved for a new trial or for a remittitur of damages. The trial judge held a hearing pursuant to Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). Following the hearing, the trial judge reduced the punitive damages award to $12.5 million, pursuant to Ala. Code 1975, § 6-11-21, and this remittitur was accepted by the plaintiff. Life of Georgia appeals.

Ms. Johnson, a resident of Grove Hill, Alabama, is an 84- year-old woman who went through the third grade in school and who spent her life as a domestic worker. Because Ms. Johnson had dealt with Life of Georgia for over 25 years, paying premiums on nine different policies, she trusted its agents. Sometime before January 8, 1990, a Life of Georgia agent, Barbara Holt, came to Ms. Johnson's home to collect the monthly premiums on her existing policies. Ms. Holt recommended that Ms. Johnson purchase a Medicare supplement policy. The next week Ms. Holt returned and again discussed the Medicare supplement policy with Ms. Johnson, who agreed to purchase the policy. Ms. Johnson testified that Ms. Holt told her that the Medicare supplement policy would protect her. She testified: "If I got in the hospital, you wouldn't have to worry about your doctor bill, you could stay in there because they would pay your doctor bill, and I got it." Ms. Holt filled out the application for Ms. Johnson.

At first, Barbara Holt testified that she asked Ms. Johnson for her Social Security card; later, she testified that she

asked Ms. Johnson for her Medicaid card and that she asked the questions on the application, one of which was whether Ms. Johnson was on Medicaid. At trial, Ms. Johnson disputed Ms. Holt's testimony that she was asked whether she was on Medicaid. Ms. Johnson showed the jury how she gave her cards to Ms. Holt, by pulling a vinyl holder out of her purse. She testified that she always kept her cards in this vinyl holder, which contained her Medicaid, Medicare, and Social Security cards.

Despite the fact that Ms. Holt knew that it was illegal and against company policy to sell a Medicare supplement policy to Ms. Johnson, because she was on Medicaid, Ms. Holt completed the application and collected the premiums on the policy. Initially the premiums were $71 per month; by 1992, they had risen to $103 -- almost one-third of Ms. Johnson's fixed income. Over almost a three-year period from 1990 through 1992, Ms. Johnson paid a total of $3,132 in premiums on this policy.

Life of Georgia first argues that it was entitled to a directed verdict or to a judgment notwithstanding the verdict, with respect to the award of punitive damages because, it argues, the plaintiff failed to prove by clear and convincing evidence that the company "consciously or deliberately engaged in oppression, fraud, wantonness, or malice" as is required by § 6-11-20, Ala. Code 1975, for the award of punitive damages. The statute provides:

> "§ 6-11-20. Punitive damages not to be awarded other than where clear and convincing evidence proven; definitions.
>
> "(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and

convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the State of Alabama.

"(b) As used in this article, the following definitions shall apply:

"(l) Fraud. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

"(2) Malice. The intentional doing of a wrongful act without just cause or excuse, either:

"a. With an intent to injure the person property of another person or entity,

or

"b. Under such circumstances that the will imply an evil intent.

"(3) Wantonness. Conduct which is carried on with a reckless or

> conscious disregard of the rights or safety of others.
>
> "(4) Clear and convincing evidence. Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.
>
> ". . . ."

The standard of review applicable to a directed verdict or to a denial of a motion for a directed verdict is whether the nonmoving party presented substantial evidence in support of his or her position. If not, then a directed verdict is proper. Bailey v. Avera, 560 So. 2d 1038, 1039 (Ala. 1990). A verdict is properly directed only where there is a complete absence of proof on a material issue or where there are no disputed questions of fact for the jury to determine. Woodruff v. Johnson, 560 So. 2d 1040, 1041 (Ala. 1990); K.S. v. Carr, 618 So. 2d 707, 713 (Ala. 1993). Life of Georgia argues strenuously that the evidence was not sufficient to meet this clear and convincing standard; however, it admits that the evidence was in sharp conflict.

The trial judge denied Life of Georgia's motion for a directed verdict because he was satisfied that the plaintiff had presented a jury question with regard to the issue of punitive damages. He stated in his Hammond order:

"Clear and and convincing evidence was presented at trial that Life of Georgia was aware of the fraudulent sale of these Medicare supplement policies. . . . Plaintiff further produced clear and convincing evidence through the testimony of three live pattern witnesses that Life of Georgia's conduct in selling these policies to elderly, uneducated, single black women was not an isolated event and had not ceased and these people were paying a very substantial portion of their fixed income for useless policies. Evidence was presented at trial that Life of Georgia was aware of the unfitness of its agent in selling this specialized type policy. Eric Peek testified that he trained Barbara Holt for Life of Georgia yet gave her no training relative to the Medicare Supplement policies because he himself did not receive training to enable him to understand and properly sell these policies. Evidence was presented at trial that Life of Georgia began marketing the Medicare supplement policies in 1986 and that continuing through the date of the verdict in June of 1994, Life of Georgia had done nothing to ferret out and correct the problem. In fact, Life of Georgia's corporate officers testified during the Plaintiff's presentation of her case that Life of Georgia had done nothing to try to prevent the sale of Medicare supplement policies to unqualified persons, even though in 1992 Life of Georgia had been faced with trial in Mobile County and experienced an adverse verdict. . . ."

The trial judge then instructed the jury that, pursuant to § 6-1-20, it must be satisfied by "clear and convincing evidence" of the plaintiff's allegations before it could return a punitive damages award. In the Hammond order, the trial judge recited the proof presented by the plaintiff as to her dealings with agent Barbara Holt in regard to the Medicare supplement policy:

> "Plaintiff proved that Life of Georgia's agent, Barbara Holt, misrepresented to her that she needed health insurance under a Medicare supplement policy in order to pay her hospital and medical bills should she become sick. There was ample and substantial evidence that Plaintiff showed Barbara Holt her Medicaid card and that Barbara Holt knew or should have known that Plaintiff did not qualify for the insurance since she was a Medicaid recipient. Plaintiff proved that Barbara Holt was not properly trained to be aware of circumstances where elderly persons living on low fixed income such as Daisey Johnson have coverage under both Medicare and Medicaid. This lack of awareness permeated Life of Georgia's entire corporate structure as the vice president in charge of marketing and training, Robert Hayes, gave uncontradicted testimony that he too would 'assume' that if someone was on Medicare they did not have Medicaid. Plaintiff proved that over 116,000 Alabamians have both Medicare and Medicaid. This lack of training and awareness fostered both intentional and reckless misconduct on behalf of its agents, including Barbara Holt. Plaintiff discovered,

> after hearing about a similar situation involving Mattie Foster and Life of Georgia, that she had been sold a Medicare supplement policy she did not need and was useless to her. Plaintiff's proof that Life of Georgia was aware of the situation where unqualified elderly people living on fixed income were sold this Medicare supplement policy yet did nothing to prevent or detect such wrongful conduct distinguishes this case from 'renegade agent' cases. Life of Georgia played an active role in allowing Barbara Holt to sell the policy in question and continue to collect the premiums."

When the evidence meets the "sufficiency" test, jury verdicts are presumed correct, and this presumption is strengthened by the trial court's denial of a motion for new trial. Therefore, a judgment based upon a jury verdict and sustained by the denial of a post-judgment motion for a new trial will not be reversed on the ground that it is against the weight of the evidence, unless it is plainly and palpably wrong. Alpine Bay Resorts, Inc. v. Wyatt, 539 So.2d 160, 162 (Ala. 1988); Ashbee v. Brock, 510 So.2d 214 (Ala. 1987); Jawad v. Granade, 497 So.2d 471 (Ala. 1986). Having carefully studied the lengthy record, we conclude was substantial evidence before the jury to support the plaintiff's claim.

Life of Georgia next contends that the trial court erred in admitting what it calls "highly improper, prejudicial and inflammatory evidence" with respect to the plaintiff's claim that Life of Georgia was negligent and wanton in its training of its agents. The company contends that the only reason the plaintiff pursued the negligent and wanton training claim was to introduce evidence that would prejudice and bias the jury against the company. This

argument disregards the Alabama statute on vicarious liability, § 6-11-27, Ala. Code 1975, and the strong proof required under this statute. The common law rule of vicarious liability is modified by § 6-11-27; this Code section requires a higher degree of proof of culpability on the part of the principal before punitive damages can be imposed against the principal for the conduct of its agent. Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d 384, 390 (Ala. 1993). This Court noted this modification in Sheridan and commented: "Thus, as a logical matter, if plaintiffs can meet the statutory requirement for vicarious liability, they will, in many cases, also have established the elements of their claims for wantonness in the hiring and supervision of the agent." Id. The plaintiff's evidence relating to her claim that Life of Georgia negligently and wantonly trained its agents was directly related to her fraud claim. Because the plaintiff was required to prove a higher degree of culpability on the part of Life of Georgia to bind it for the acts of its agent, the trial court did not err in admitting this evidence. Id.

Next, Life of Georgia argues that it is entitled to a remittitur of the $250,000 compensatory award, on the grounds that the award grossly exceeds the plaintiff's "mental anguish" damages and her $3,132 out-of-pocket loss. Life of Georgie contends that the only evidence presented by the plaintiff concerning her mental state, upon learning that the insurance policy she had paid on for almost three years was worthless, was "that it made her angry" and that it "worried" her. The record reflects that this is not an accurate picture of her testimony. Ms. Johnson testified that after she learned that she had been paying the premiums on a worthless insurance policy, she could not sleep and her meal schedule was disrupted. Her testimony that she ran two insurance agents off her property, telling them "to leave -- leave out of my yard and don't come back" is evidence from which the jury

could conclude that Ms. Johnson was distressed to learn that she had been paying for a worthless policy and that she had suffered mental anguish as a result. The jury listened to her evidence and concluded that she had suffered emotionally as a result of the company's conduct. "[T]here [is no] yardstick to measure the amount of recompense which should be awarded for. . . mental suffering." Birmingham Electric Co. v. Thompson, 251 Ala. 465, 466, 37 So. 2d 633, 634 (1948).

The trial judge also reviewed the evidence presented by the plaintiff concerning her claim for mental anguish. He concluded: "Ample evidence was presented at trial which supports the total compensatory damages award of $250,000 against Life of Georgia." This Court has said that the trial judge has much discretion in determining whether to grant a new trial and whether to require a remittitur of damages for mental anguish. Crown Life Ins. Co. v. Smith, 657 So. 2d 821 (Ala. 1994); Fields v. Parker, 361 So. 2d 356 (Ala. 1978). We find no abuse of discretion on his part in denying the motion for a new trial and in refusing to remit the award for compensatory damages, based upon the evidence before him. Pitt v. Century II, Inc., 631 So. 2d 235, 239 (Ala. 1993).

Finally, we come to the question of the imposition of punitive damages. Life of Georgia, a tortfeasor that has been found by this jury to be guilty of conduct for which the law permits the imposition of punitive damages, argues that its rights have been unconstitutionally impinged upon by the imposition of such damages. Over the years the constitutional arguments advanced in efforts to eliminate or to cap punitive damages awards have taken different forms. It has been argued that the "excessive fines" provisions of the State and Federal Constitutions forbid the imposition of punitive damages. Kumar v. Lewis, 561 So. 2d 1082 (Ala. 1990); Industrial Chemical & Fiberglass Cord. v.

Chandler, 547 So. 2d 812 (Ala. 1988); Alabama Power Co v. Turner, 575 So. 2d 551 (Ala. 1991), cert. denied, 500 U.S. 953 (1991). As it relates to the Eighth Amendment, this argument was rejected by the United States Supreme Court in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), and this argument now has largely been abandoned. See Ingraham v. Wright, 430 U.S. 651 (1977). More recently, the due process provisions of the Fourteenth Amendment have been the basis of constitutional challenges where, as in this case, the defendant argues that the award of punitive damages is grossly excessive and fundamentally unfair and therefore contravenes Alabama law and the Due Process Clause of the Fourteenth Amendment. See Intercontinental Life Ins. Co. v. Lindblom, 571 So. 2d 1092 (Ala. 1990) vacated. It is also frequently argued that, under Alabama law, juries are provided too few standards for determining a verdict appropriate both to punish the defendant, whose conduct inflicted harm upon the victim, and to deter others from engaging in similar conduct, without completely destroying the defendant financially. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

These arguments have been carefully considered by this Court. The standards set forth in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. Hornsby, So. 2d 218 (Ala. 1989), were adopted partly in response to these concerns. These cases require the trial court, after the jury returns a verdict that the defendant claims to be excessive, to consider all relevant factors bearing on the issue of excessiveness when viewed from the perspective of the defendant. The factors set out in Hammond and Green Oil are not intended to be all-inclusive. Trial judges are encouraged to consider any evidence that has any relevance to the question of the fairness and justness of the jury verdict.

In this case, a jury found that Life of Georgia had defrauded an elderly Alabama citizen, and there was evidence that she was not the only Alabama victim of such fraud. The evidence established, and a jury has found, that the conduct of Life of Georgia justifies requiring it to pay a substantial sum of money as punitive damages. The trial judge has considered evidence offered in a post-verdict hearing pursuant to Hammond and Green Oil. After that hearing, the trial judge ordered a remittitur and explained his order, remitting the $15 million punitive damages award to $12.5 million, as follows:

> "This Court is mindful that this verdict is large. Yet this Court finds that a punitive damages award of $12,500,000 bears a reasonable relationship to the harm that is likely to occur from Life of Georgia's conduct as well as to the harm that actually has occurred. The harm which was committed is even more egregious because Life of Georgia refuses to admit or concede any wrongdoing whatsoever and merely [attributes] the sale of this policy [to] a 'miscommunication.' Life of Georgia has profited from such 'miscommunications.'
>
> "This Court finds that the economic impact of the verdict on Defendant Life of Georgia is slight. In 1993, the company had assets exceeding $2.3 billion. Investment income alone totaled $173 million for 1993 and the company has over $1.1 billion in reserve. The company has testified that it has sufficient resources to pay the judgment if it should be affirmed. The financial position of Life of Georgia does not support any reduction in this verdict.

"The Court finds that the the verdict should be high in order to encourage a plaintiff such as this, and her attorneys, to pursue this type of case. The Court is of the opinion that there are many people situated such as Plaintiff who are unable due to sickness, age, infirmity or whatever to pursue such a case. The Court has considered whether the cost of this litigation favors remittitur and is of the opinion that this factor does not weigh in favor of reducing this verdict.

"The Court has compared this verdict to other verdicts affirmed by the Alabama Supreme Court, including Northwestern Mutual Life Insurance Co. v. Sheridan, [630 So. 2d 384 (Ala. 1993)]. The Court is mindful that the $15 million punitive award is $2,500,000.00 larger than that amount affirmed in Sheridan, which is the largest punitive damages award in a fraud case ever affirmed by our Supreme Court. The Court has compared the facts of the Sheridan case, as set forth in the Supreme Court's opinion, and the facts of this case. The Court is clearly convinced that the wrongful conduct in this case is much worse. The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income. Life of Georgia knew that these types of individuals were easily persuaded, and used sales techniques such as 'fear' to sell these policies. The Court further compared this verdict to other verdicts similar in nature. Nevertheless, although

this Court is of the opinion that the facts in this case are much worse than those in the Sheridan case, the Court is of the opinion that the punitive award in this case should be reduced by $2.5 million so as to not exceed the largest punitive award affirmed by our Supreme Court.

"Next, the president of Life of Georgia testified that Life of Georgia ceased doing business in Alabama and would never return. He also testified that if any policyholder of Life of Georgia had been sold a Medicare supplement policy who had received Medicaid benefits, that person's premiums would be immediately refunded. He further stated that Life of Georgia had undertaken a program in Alabama to determine whether there were any policyholders situated such as Daisey Johnson. However, the Court is aware that following the testimony of Life of Georgia's president, a witness testified by deposition for Plaintiff that her 91-year-old father was on Medicaid, had been sold a Medicare supplement policy, and that she had demanded Life of Georgia return his premiums. Ms. Pernell, the daughter of the person sold the Medicare supplement policy, was informed by Life of Georgia that they would not refund the premiums. This testimony contradicts that of the president and concerns the Court as to the quality of Life of Georgia's assertion that it would refund premiums once an unqualified policyholder came forward.

> "It is the conclusion of this Court that the verdict was not based upon bias, passion, prejudice, corruption, or other improper motive, but instead was the product of the jury's careful and studious consideration of the evidence and applicable law. This conclusion is based in part on this Court's observing . . . all of the parties to the trial, the respective attorneys, and the jury and its reaction to all of the others. The jury was justified in awarding these damages to punish Life of Georgia and to prevent similar wrongs in the future. The imposition of these damages in this case creates a strong incentive for vigilance on the part of all insurance companies doing business in this state. The jury arrived at an amount that it considered necessary to vindicate the public interest by eliminating the reprehensible conduct of this defendant and in punishing it appropriately. This verdict is not so large that it goes beyond an amount necessary to accomplish these goals. This verdict will have little, if any, impact upon Life of Georgia and other insurance companies unless it is substantial . . . ."

The trial judge's order demonstrates that he focused on the conduct of Life of Georgia to determine whether the punishment was excessive in relationship to that conduct. The trial judge also considered the public policy upon which punitive damages are based: to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct. The trial court remitted the award to an amount that it determined, from an examination of the facts specific to the defendant, was not excessive; the court determined that the reduced award is

not so large as to destroy the defendant, but is large enough to serve the public policy of punishment and deterrence.

Alabama citizens who become the victims of fraud have little recourse other than through litigation. The record in this case is replete with expert testimony to the effect that the State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have. Punitive damages have historically been part of the remedy for such victims, and to get that remedy they must prove that the defendant intentionally inflicted the injury for which punishment is sought. As Jonathan Massey, writing recently in Trial magazine, explained, punitive damages have been used "to help equalize the playing field between the powerful and the powerless -- whether between king and subject, railroad and passenger, or corporation and consumer." "Why Tradition Supports Punitive Damages: and How the Defense Bar Misreads History," Trial, September 1995 p. 19. Massey continues:

> "Punitive damages awards in consumer fraud and products liability cases are within the historical tradition of tort law for an even more fundamental reason: Punitive damages have traditionally been used as a populist weapon to help level the playing field between powerless plaintiffs and powerful defendants. As the U.S. Supreme Court observed in an 1886 case,
>
> > "'The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be not only

> compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition. [Barry v. Edmunds, 116 U.S. 550, 556 (emphasis added)].'
>
> "In common law England, punitive damages were often against the crown and the aristocracy. In 19th-century America, they were frequently used against railroads and robber barons. As the Pennsylvania Supreme Court observed in 1886, 'The liability of railway and other corporations to exemplary damages for gross negligence is well settled.' [Lake Shore & Michigan S. Ry. v. Rosenzweig, 113 Pa. 519, 544, 6 A. 545 (1886)].
>
> "The modern-day heir of this populist legacy is the consumer plaintiff suing a large corporate defendant. Using punitive damages to redress the imbalance in the relationship between consumer and corporation is squarely within their historical tradition."

Id. at pp. 24-27.

Attorneys who represent victims of fraud, such as the fraud practiced upon this plaintiff, usually bear all of the expense of the litigation and carry all of the risk of failure. They are reimbursed only if the victim recovers from the wrongdoer. The lawyer takes a significant risk in such

cases. According to Business Week magazine,[1] plaintiffs today are losing a greater proportion of cases that go to trial than in past years; in 1988 plaintiffs won 63% of the cases that went to trial, but in 1992 plaintiffs won only 54%. This Business Week statistic is supported by a United States Justice Department Survey[2] of the country's 75 most populus counties, which concluded that in 1992 that only 2% of the 762,000 civil cases disposed of in those counties were decided by juries, and that plaintiffs won in only 52% of those cases.[3]

American Bar Association statistics show that personal injury claims represent only 9% of the civil caseload in this country. Since 1986, personal injury cases have remained essentially flat on the scale, while domestic relations matters have increased by 43%.[4]

There are also many cases that are concluded by the entry of a summary judgment for the defendant. Cases decided by summary judgments formed the largest category of civil cases decided by this Court in 1994, 47.6%. Eighty-three percent of those cases were affirmed by this Court, either in

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[1]"Corporate America's fear of juries may be overblown," Business Week, November 8, 1993.

[2]"Civil Jury Cases and Verdicts in Large Counties" is a joint project of the Bureau of Justice Statistics and the National Center for State Courts.

[3]Richard C. Reuben, "Plaintiffs Rarely Win Punitives, Study Says," A.B.A. Journal, p. 26, October 1995.

[4]Statistics according to the State Court Caseload Statistics Annual Report 1992, published February 1994. The report is a joint project of the Conference of State Court Administrators, the State Justice Institute, and the National Center for State Courts Court Statistics Project.

whole or in part. In those cases in which the plaintiff's lawyer works on a contingency fee basis, the lawyer loses the amount she or he has expended in filing the action and in preparing for trial.

Litigation is slow and costly and carries no guarantee of success. Victims of fraud bear the burden of proving to the satisfaction of a jury of 12 citizens that they have been victimized by the defendant. It is a heavy burden, and litigation is an inefficient way to stop fraudulent conduct -- one lawsuit at a time, brought by one victim at a time -- but it provides only recourse a defrauded citizen of Alabama has.

The question whether setting standards for post-trial review of a jury's verdict is sufficient to provide due process, while allowing the jury discretion to determine punitive damages, has been much discussed. Under our present procedure, the jury, before rendering its verdict, never hears whether the amount it selects as the appropriate amount for punishing the defendant and deterring others from similar conduct is actually an appropriate amount, considering the factors that trial courts and appellate courts must consider in reviewing jury verdicts (i.e., the Hammond and Green Oil factors). In some cases, the plaintiff or defendant may offer evidence that the acts complained of resulted in profit to the defendant in a specific amount. In some cases the evidence might show how much or how little it would have cost the defendant to remedy a defect in a product or to change its method of doing business, but, in most cases, it could be argued that the jury has incomplete information from which to determine with certainty the amount that is appropriate to serve the ends for which punitive damages were intended. Under our present procedure, much evidence relevant to reaching a decision as to an appropriate amount to punish the particular defendant is withheld from the jury. To

reaching a verdict and to fix an amount of punitive damages, the jury may consider only the character of the defendant's conduct and the degree of wrong as shown by the evidence in the case. These strictures on the evidence that the jury may consider in awarding punitive damages result from concern that evidence of the defendant's wealth or the defendant's lack of wealth and other evidence that is relevant, if not critical, to the issue the jury is asked to decide must be excluded because such evidence could potentially influence the jury to the prejudice of one party or another. We have concluded, after much deliberation, that the need for more guidance for the jury in these cases outweighs the concern that such evidence might prejudice the jury. Juries are presumed to follow the law as instructed by the trial court. There is no reason to assume that the jury would disregard the trial court's instructions on this issue.

Separating the fact-finding process for adjudging liability and compensatory damages from the damages-assessment process in a punitive damages case and, at the same time, improving the reliability of the punitive damages-assessment process is a procedural goal that was recognized by Justice Jones in his special concurrence in Ridout's-Brown Service, Inc. v. Holloway, 397 So.2d 125 (Ala. 1981), as adopted by this Court in Green Oil Co. v. Hornsby, supra. Justice Houston, concurring specially in Charter Hosp. of Mobile, Inc. v. Weinberg, 558 So.2d 909 (Ala. 1990), expressed his opinion that constitutional due process provisions are violated when the jury is "given the unbridled discretion to award no punitive damages or to award an unlimited amount of punitive damages, taking into consideration only the character and the degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs in the future." 558 So. 2d at 917. Justice Houston then set out a procedure

providing for a bifurcated trial as a way to ensure due process:

> "Therefore, I would recommend that the following procedure be applied in all jury cases involving claims for punitive damages and as to which claims a party had a right to trial by jury at common law prior to the adoption of the first Alabama Constitution . . . .
>
> "A jury will determine the issues of liability, the amount of compensatory damages, and whether the defendant's conduct warrants the imposition of punitive damages. In addition to other jury verdict forms, in common law cases involving punitive damages the following jury verdict form should be given to a jury for each party against whom punitive damages are sought:
>
> "'In accordance with the instructions given to us by the trial court, we find that punitive damages (should) (should not) be assessed against (name of party against whom punitive damages are sought).'
>
> "In the event that the jury determines that punitive damages should be imposed against one or more defendants, the trial will resume; and evidence of the following, which was not admissible in the trial in chief, shall be admissible upon an offer by any party in accordance with the rules of evidence.*

"Evidence of the harm that was likely to occur from the defendant's conduct as well as the harm that actually has occurred is relevant. The jury should be instructed that, if it finds that the actual and likely harm is slight, the punitive damages (subject to the other factors hereinafter set out) should be relatively small. If the actual harm and/or likely harm was grievous, the punitive damages (subject to the other factors hereinafter set out) should be much greater.

"The duration of the defendant's conduct, the degree of the defendant's awareness of any hazard that his conduct has caused or is likely to cause, any concealment or 'cover-up' of that hazard, and the existence and frequency of similar conduct of the defendant are relevant. The jury should be instructed that if it finds that the defendant's offensive conduct was of long duration or was frequently repeated; that the defendant acted with awareness that his conduct was causing or was likely to cause the hazard by which the plaintiff was in fact damaged; or that the defendant concealed or covered up that hazard, then such a finding should increase the amount of punitive damages.

"The profitability of the conduct to the defendant is relevant. The jury should be instructed that the punitive damages should remove all profit from the wrongful conduct and should be in excess of the profit, so that the damages would 'sting.'

"The financial position of the defendant is relevant. The jury should be instructed that the amount of punitive damages should 'sting' the defendant, considering his financial condition.

"All costs of the litigation, including the attorney fees to be paid to the plaintiff's attorney, are relevant; and the jury should be instructed that its award should include all reasonable costs of litigation, so as to encourage injured parties to bring wrongdoers to trial.

"If criminal sanctions have been imposed on the defendant for his conduct, this is relevant; and the jury should be instructed that such criminal sanctions should be taken into account in mitigation of the punitive damages award.

"If there have been other civil actions against the defendant based on the same conduct and if punitive damages have been assessed against the defendant in those civil actions, this is relevant; and the jury should be instructed that it should consider this in mitigation of the punitive damages award.

"I believe that, if these factors are considered by a jury in assessing the amount of punitive damages a defendant should pay, this will improve the reliability of the punitive damages assessment process and will fit the punishment to the offensive conduct of the offender. I believe that by doing this in a bifurcated trial the court could

> preserve the reliability of the fact-finding process for adjudging liability, thereby accomplishing the goal we set in Green Oil Co. v. Hornsby, supra, when we adopted Justice Jones's special concurrence in Ridout's-Brown Service, Inc. v. Holloway, [397 So.2d 125, 127-28 (Ala. 1981)].
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> "*A bifurcated trial is also recommended by the American College of Trial Lawyers, 'Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice' (March 3, 1989), pp. 18-19."

558 So.2d at 917-18.

I. Bifurcation

We hold that after the new procedures announced in this case become effective in all cases in which punitive damages are sought, excluding all actions based upon wrongful death, the trial shall be bifurcated in accordance with the procedure set out in Justice Houston's special concurrence in Charter Hospital of Mobile v. Weinberg, supra. The trial court shall charge the jury on the appropriate law, and the jury shall determine liability and the amount of compensatory damages, if any. The jury will also decide, by special verdict, whether the evidence justifies the imposition of punitive damages. In order to get an award of punitive damages, the plaintiff must prove a prima facie case of conduct supporting an award of punitive damages and the jury's decision to award punitive damages must be based upon clear and convincing evidence. If the jury returns the special verdict in the affirmative, the trial shall resume for the second part of the bifurcated trial.

In the second part, all evidence shall be admitted that is relevant to the question of what amount would be appropriate, to accomplish the purposes punitive damages were designed to serve, and it shall be admitted in accordance with § 6-11-23(b), Ala. Code 1975, which provides:

> "(b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. . . ."

All evidence that has heretofore been admissible at post-verdict Hammond/Green Oil hearings, can be introduced under this new procedure, before the jury retires to consider its punitive damages verdict.

The jury is to be guided not only by the factors set forth in Hammond and Green Oil, but also by those factors stated in the statute and in other case law. Davis Carr, writing in

the Alabama Lawyer, has offered the following compilation of factors, drawn from both case law and statute, that can be considered:

> "From the statute [§ 6-11-23, Ala. Code 1975 (Supp. 1989)]:
>
> "1. Nature, extent and 'economic impact' of verdict on plaintiff or defendant.
>
> "2. Amount of compensatory damages.
>
> "3. Whether defendant has been guilty of similar acts in the past.
>
> "4. The nature and extent of any effort by defendant to remedy the wrong.
>
> "From Green Oil:
>
> "1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?
>
> "2. The degree of reprehensibility of defendant's conduct, including:
>
> "(a) the duration of this conduct;
>
> "(b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause;
>
> "(c) any concealment or cover-up of the hazard;
>
> "(d) existence and frequency of similar past conduct.
>
> "3. Punitive damages should remove the profit, if any, from the defendant and

should be in excess of the profit so that defendant recognizes a loss.

"4. Defendant's 'financial position.'

"5. Cost of litigation to the plaintiff.

"6. If defendant has received criminal sanctions, that should be taken into account in mitigation.

"7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

"From Hammond:

"1. Culpability of defendant's conduct.

"2. The desirability of discouraging others.

"3. 'The impact' on the parties.

"4. 'Impact' on innocent third parties.

"From Holloway [Ridout's-Brown Service, Inc. v. Holloway, 397 So.2d 125, 127 (Ala. 1981)]:

"The punitive damages award should sting, but ordinarily it should not destroy.

"From Wilson [v. Dukona Corp., N.V.,547 So.2d 70 at 73 (Ala. 1989)]:

"Defendant's 'right to fair punishment' must be considered

> above plaintiff's right to recover the fullest amount of punitive damages.
>
> "From Lavoie [Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050 at 1053 (Ala. 1987)]:
>
> > "'A comparative analysis with other awards in similar cases.'"[5]

We agree with the parties and amici curiae that the fact of the existence of liability insurance and the amount thereof cannot be disclosed to the jury. In addition, the discovery of financial information concerning the defendant will be limited to that which is relevant to the issue in the case. How much the defendant profited as a result of the tortious conduct would be relevant, as would, in many cases, how much it would have cost the defendant to avoid the tortious conduct. The net worth of the defendant may or may not be relevant, depending upon the nature of the case. In no event, however, is the defendant to be punished for its size or its success, only for its tortious conduct. This new procedure is intended to allow the jury to decide, based upon all the evidence that is relevant to that inquiry, the award that the specific defendant before the jury should be required to pay as punishment for the specific conduct justifying the punitive award.

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[5]Davis Carr, "Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here? " Ala. Lawyer, Vol. 51, March 1990, pp. 94-95. Mr. Carr's article carried the following note: "As to this listing of factors, the author hereby acknowledges 'limited plagiarism' from a handout by Danner Frazer, Jr., 'How to Handle a Post-Judgment Punitive Damage Hearing -- Discovery to End,' presented at the Alabama Defense Lawyers Association fall meeting, 1989."

The adoption of this bifurcated procedure is not a substitute for post-trial procedures for reviewing punitive damages awards. These awards, when challenged as excessive or inadequate, still must be considered through the procedures set out in Green Oil v. Hornsby, supra, and Hammond v. City of Gadsden, supra. However, the evidence need not be readmitted in any post-verdict hearing on the question of excessiveness. Only such evidence as was not available for consideration by the jury that bears on the issue of excessiveness will be admitted in a post-verdict hearing on excessiveness. The trial courts must continue to review jury verdicts not only for excessiveness, but also to determine the validity of other challenges to jury verdicts. After this procedure is put in place, it can no longer be said that juries are left with no guidance in determining an appropriate punitive award.

II. Allocation

Much of the criticism surrounding the issue of punitive damages has been based on the perception that punitive damages awards sometimes amount to undeserved windfalls to the prevailing plaintiffs. Chief Justice Rehnquist has suggested that the windfall effect could be avoided by requiring the losing defendant to pay the punitive award "to the State, not to the plaintiff -- who by hypothesis is fully compensated." Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, C. J., dissenting). Such broad power to shape and effectuate remedies is deeply rooted in the common law Eisenberg and Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

Some states have passed statutes that allocate punitive damages and require that a portion of each punitive damages award be paid to the state general fund or some

special fund that serves a public purpose. Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 887 (Ala. 1991). For example, Illinois[6] and Iowa[7] allocate punitive damages pursuant to statute. Florida[8] and Colorado[9] passed such statutes in 1987; these were both repealed, effective 1995.

A special concurrence in Preferred Risk, 577 So. 2d at 886, suggested that if a court concludes that the amount of punitive damages awarded is not so large as to deprive the defendant of property in contravention of § 13 of the Alabama Constitution of 1901 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, then the court, nevertheless, may also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to devote part of the amount to such purposes as the court may determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public interest and deterrence to the defendant and to others who might commit similar wrongs in the future. This viewpoint was again expressed by three Justices in

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[6]Ill.Rev.Stat. Ch. 110, para. 2-1207 (Supp. 1987); now cited as Ill.St.Ch. 735 § 5/2-1207.

[7]Iowa Code Ann. § 668A.1(2)(b) (West Supp. 1987).

[8]Fla.Stat.Ann. § 768.73(2) (West Supp. 1987); held constitutional in Gordon v. State, 608 So.2d 800 (Fla. 1991) cert; repealed by Laws 1992, c. 92-85, § 3, effective July 1, 1995.

[9]Colo.Rev.Stat. § 13-21-102(4) (1987); held unconstitutional in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991), because a judgment for exemplary damages qualifies as a property interest under Colorado law (there is no right to punitive damages under Alabama law); repealed by Laws 1995, H.B. 95-1090, § 1, effective March 9, 1995.

Smith v. States General Life Ins. Co., 592 So.2d 1021, 1025 (Ala. 1992), and in special concurrences in Principal Financial Group v. Thomas, 585 So.2d 816, 819 (Ala. 1991) (with Shores, Houston, and Steagall, JJ., joining), cert. denied, 502 U.S. 1009 (1991); Southern Life & Health Ins. Co. v. Turner, 586 So.2d 854, 859 (Ala. 1991); Union Mortgage Co. v. Barlow, 595 So.2d 1335, 1348 (Ala.), cert. denied, 506 U.S. 906, (1992); BMW of North America, Inc. v. Gore, 646 So.2d 619, 629 (Ala. 1994).

In a special concurrence in BMW of North America, Inc. v. Gore, supra, a Justice views a procedure that directs a substantial portion of punitive damages awards to the state general fund or some special fund that serves a public purpose as a means of both avoiding the windfall effect and strengthening the jury system:

> "In the name of all that is fair, I ask this Court, which has consistently held that plaintiffs have no right to punitive damages, to direct that all or a substantial portion of punitive damages awarded in civil cases, after deducting attorney fees and expenses litigation, be paid to the state general fund or to some special fund that serves a public purpose or advances the cause of justice. If this is done, then the time-honored and constitutionally mandated right to trial by jury will not be perceived, insofar as punitive damages is concerned, as Alabama's lottery, as it is now perceived by so many."

646 So.2d at 631. We agree, and we now hold that a part of the punitive damages awarded in future cases (excluding cases based on wrongful death) shall be paid into the state general fund. It is appropriate and fair that some part of

the civil fine imposed by juries in the form of punitive damages awards should be devoted to the general welfare of all the citizens of Alabama. We believe that this practice will strengthen the public's confidence in our civil justice system because, under this procedure, wrongdoers can be appropriately discouraged from inflicting harm upon others without inappropriately rewarding the victim.

All punitive damages judgments (excluding all damages in actions based upon wrongful death) that are entered as a result of the new bifurcated procedure shall be allocated as follows: After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff's attorney fees (as determined in accordance with any agreement between the plaintiff and the plaintiff's attorney), paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State general fund. The fact that the State may ultimately share in some part of a punitive damages award does not mean that the State has a vested interest in a private lawsuit seeking punitive damages. The State shall have no right to intervene or participate in such cases. The parties will continue to have full authority to settle cases without the participation or consent of the State, and court approval is not required. In the case of settlement, the parties need not designate any part of the settlement proceeds as punitive damages and no part of the settlement proceeds shall be paid into the general fund. In summary, the right of the parties to settle any lawsuit is unaffected by this opinion.

III. Judicial Review of Jury Verdicts in General

Under our system of government, with its guarantee of separation of powers between the executive, legislative, and judicial branches of government, it is peculiarly and exclusively the function of the judiciary to determine whether a jury award in a civil case exceeds the amount that the State and Federal Constitutions will allow without violating the due process rights guaranteed to all citizens of this State and this country. Armstrong v. Roger's Outdoor Sports, 581 So.2d 414, 419 (Ala. 1991). The separation of powers provision, found in Article III, § 42, of the Alabama Constitution of 1901, provides:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive to another, and those which are judicial to another."

Section 43 reads:

> "In the government of this state, except in the instances in this Constitution, hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

In Armstrong v. Roger's Outdoor Sports, we held certain statutes, which attempted to remove all presumption of correctness from a jury verdict and from a trial court's judgment, to be unconstitutional as a violation of the separation of powers provisions of the Alabama Constitution, Article III, §§ 42 and 43.[10] Armstrong, 581 So. 2d at 421. In Armstrong v. Roger's Outdoor Sports we quoted with approval Cobb v. Malone, 92 Ala. 630, 9 So. 738 (1891):

> "'The power to set aside verdicts has been generally regarded in this country as inherent in courts organized upon the principles of common law, though in some States it is regulated by statute, enumerating the grounds upon which a motion for a new trial may be made. The power is essential to prevent irreparable injustice in cases where a verdict wholly wrong is the result of inadvertence, forgetfulness, or intentional or capricious disregard of the testimony, or of bias or prejudice, on the part of juries, which sometimes occurs. . . .'"

581 So. 2d at 419.

In two other cases, this Court had held that statutes enacted by the legislature violated the right-to-jury-trial provisions of the Alabama Constitution. In Moore v.

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[10]In Armstrong, we wrote: "In summary, we hold that § 6-11-23(a), § 6-11-24(a), and the parenthetical phrase in the last sentence of § 6-11-23(b) are unconstitutional. Section 6-11-24(b) and the remaining portion of § 6-11-23(b) are constitutional as construed herein." 581 So. 2d at 421.

Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991), this Court held that § 6-5-544(b), Ala. Code 1975, which limited the amount of "noneconomic" damages recoverable in a medical malpractice action, violated the right to trial by jury as guaranteed by Article I, § 11, of the Alabama Constitution 1901. This section provides "[t]hat the right of trial by jury shall remain inviolate." Then, in Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993), this Court held that a limitation on punitive damages, such as that imposed by § 6-11-21, clearly impairs the traditional function of the jury, thus violating the right to trial by jury guaranteed by Article I, § 11. In those cases, we said that, under an analysis of § 11, the pertinent question is not whether the right still exists under the statute, but whether it still remains inviolate. 627 So. 2d at 885 (quoting Alford v. State, 170 Ala. 178, 197, 54 So. 213 (1910)). Because the majority was convinced that the statutes violated the right-to-jury-trial provision of the Alabama Constitution, it was not necessary in those cases to decide whether those statutes also violated the separation of powers provisions of the Alabama and United States Constitutions. However, it is arguable that these statutes did violate the separation powers provisions.

Because, under the separation of powers provisions, it is the inherent and exclusive power of the judiciary to determine whether a jury award in a civil case exceeds the amount that the State and Federal Constitutions will allow without violating due process rights, the trial judge in this case, in a post-verdict Hammond hearing, considered the question whether the jury had followed its instructions on the law, as well as whether the verdict was the result of passion or bias in favor of, or against, either side in the litigation. After so doing, he ordered a remittitur of the $15 million award of punitive damages to $12.5 million.

IV. APPELLATE REVIEW IN THIS CASE

We have independently reviewed the evidence in this case, applying the factors set forth in Green Oil Co. v. Hornsby, 539 So.2d 218, 223-24 (Ala. 1989), cited in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), and quoted in Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d 384 (Ala. 1993), including:

> "'(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.' Haislip, 499 U.S. at 21-22, 111 S. Ct. at 1045."

Northwestern Mut. Life v. Sheridan, 630 So. 2d at 393.

We conclude, as did the trial judge, that the conduct of this defendant was egregious and reprehensible and resulted in a great financial hardship to some of the most vulnerable members of our society. Life of Georgia fraudulently sold

policies to people on Medicaid that were totally worthless to the victims of the fraud. Life of Georgia had no risk under these fraudulently sold policies. The practice was a sham and would never have been permitted in this state if the activities of insurance agents were properly regulated. However, as reprehensible as Life of Georgia's conduct was, it is not the most odorous this Court has been required to review. Without in any way condoning the conduct, we nevertheless are compelled, when comparing this conduct with other acts perpetrated upon Alabama citizens, to reduce the award against the defendant Life of Georgia to $5 million.[11] Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991). It is the opinion of this Court that $5 million is not excessive for punishment and deterrence specific to Life of Georgia, considering all of the facts of this case.

V. PROSPECTIVE APPLICATION OF THE PROCEDURES ANNOUNCED IN THIS CASE

The new procedures announced in this case shall be applied in all cases in which punitive damages are sought (excluding all actions for wrongful death) which are filed more than 90 days after the certificate of judgment issues in this case. We are persuaded by the arguments of both parties that these new procedures, including allocation of part of the punitive damages award, should not be applied in this case or in any other case filed within 90 days after

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[11]Justice Maddox in his writing, concurring in part and dissenting in part, has attached statistics appearing on pages he designates as Appendix A to his special writing, and he cites the data included on those pages. Those pages appearing as Justice Maddox's Appendix A were not authenticated and were merely attached to a brief filed in this case. The writing on those pages has no probative value.

the issuance of the certificate of judgment in this case. Inevitably, the new procedures announced here will affect settlement negotiations, and they may, as suggested by some amici curiae, promote more settlements. These and other considerations convince us that these procedures should have prospective effect only. Accordingly, we hold that the procedures announced in this opinion shall be applied in all punitive damages cases (excluding wrongful death cases) filed more than 90 days after the certificate of judgment issues in this case.

SUMMARY OF HOLDINGS

I. Bifurcation

The trial of all cases in which punitive damages are sought (excluding cases based upon wrongful death causes of action), that are filed more than 90 days after the certificate of judgment issues in this case, shall be bifurcated. The jury shall first determine liability and the amount of compensatory damages, if any. The plaintiff must prove a prima facie case of conduct supporting an award of punitive damages, and the jury's decision must be based upon clear and convincing evidence. If the jury finds against the defendant, it will also decide, by a special verdict, whether the evidence justifies the imposition of punitive damages. If the jury returns the special verdict in the affirmative, the trial shall resume.

In the second part of the trial, all evidence shall be admitted that is relevant to the question of what amount would be appropriate to accomplish the purposes punitive damages were designed to serve, and it shall be admitted in accordance with § 6-11-23(b), which provides:

> "(b) In all cases wherein a verdict for punitive damages is awarded, the trial court

> shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. . . ."

All evidence that has heretofore been admissible at post-verdict Hammond/Green Oil hearings, can be introduced under this new procedure, before the jury retires to consider its punitive damages verdict. However, the fact of the existence of liability insurance and the amount thereof cannot be disclosed to the jury. In addition, the discovery of financial information concerning the defendant will be limited as provided in § 6-11-23(b) and shall be limited to information that is relevant to the issue in the case. The net worth of the defendant may or may not be relevant, depending upon the nature of the case. Again, we reiterate that a defendant is not to be punished for its size or its success; instead, it may be punished only for the tortious conduct proved in the trial of the case. This new procedure is intended to allow the jury to decide, based upon all the evidence that is relevant to that inquiry, the award that the

specific defendant before the jury should be required to pay as punishment for the specific conduct made the basis of the action.

If the punitive damages verdict is challenged in a post-verdict motion as excessive or inadequate, it must still be considered by the trial judge through the procedures set out in Green Oil Co. v. Hornsby, supra, and Hammond v. City of Gadsden, supra.

II. Allocation

All punitive damages (excluding all damages in actions based upon wrongful death) awarded by judgments entered as a result of the new bifurcated procedure established by this opinion shall be allocated as follows: After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff's attorney fees, paid. In doing so, the trial court will enforce any agreement between the plaintiff and counsel for the plaintiff as to attorney fees. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State general fund.

The State shall have no vested right in any private lawsuit in which punitive damages are sought and shall not be permitted to intervene or participate in any way in the trial or settlement of such cases. Court approval is not required to settle such cases. In the case of settlement, the parties need not designate any part of the settlement as punitive damages, and no part of the settlement proceeds shall be paid into the general fund. In summary, the right of the parties to try and settle any lawsuit is unaffected by this

opinion. Settlement of these cases, like all others, is encouraged.

III. Reduction of the Punitive Award

The award of $12.5 million in punitive damages is reduced to $5 million.

IV. Prospective Application

The new procedures announced in this case shall be applicable only to cases in which punitive damages are sought (excluding all actions based upon wrongful death) and only to cases that are filed more than 90 days after the certificate of judgment issues in this case.

Judgment

That portion of the judgment awarding compensatory damages is affirmed. The award of punitive damages is reduced to $5 million. If the plaintiff does not, within 28 days of the date of this opinion, file in this Court a remittitur of $7.5 million, then the defendant shall be granted a new trial.

APPLICATIONS GRANTED; OPINION WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY.

Almon, Houston, Kennedy, Ingram, and Cook, JJ., concur.

Hooper, C.J., concurs in the result in part and dissents in part.

Maddox and Butts, concur in part and dissent in part.

HOOPER, CHIEF JUSTICE (concurring in the result in part and dissenting in part):

I concur in the result as to parts II, III, and IV, as the result is stated in the "Summary of Holdings" portion of the opinion. See ___ So. 2d at ___. Specifically: (1) I agree with the decision to allocate half of a punitive damages award to the State, because the plaintiff does not have a proprietary or any other interest in a punitive damages award, see City Bank of Alabama v. Eskridge, 521 So. 2d 931, 933 (Ala. 1988); (2) I agree with the reduction of the punitive damages award from $12.5 million to $5 million; and (3) I agree with the procedures set out in part IV. I dissent from part I of the majority opinion because that holding violates the clear intent of the Legislature in Ala. Code 1975, § 6-11-23(b), and also changes a common law principle of 140 years' standing that had excluded evidence of a defendant's wealth or financial position from being considered by the jury.

Evidence of a defendant's wealth or financial standing has never been admissible in a jury trial. Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025 (Ala. 1978); and Ware v. Cartledge, 24 Ala. 622, 627 (1854). This principle was reinforced by the fact that the Hammond/Green Oil factors were never intended to be considered by the jury, but solely by the judge in considering whether a jury award was proper. Reserve National Ins. Co. v. Crowell, 614 So. 2d 1005, 1009 (Ala. 1993). Allowing evidence of a defendant's wealth into evidence brings the politics of resentment into the courtroom and encourages and legitimates the Robin Hood reaction.

In 1987, in the "Tort Reform Act," the Legislature adopted the common law rule excluding evidence of a defendant's financial position. Section 6-11-23(b) states:

"[T]he trial court shall . . . either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages." That section goes on to state that evidence of the economic impact of the verdict on the defendant "shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered" (emphasis added). The purpose of § 6-11-23(b) was to prevent the exposure of such evidence to a jury. The majority's holding on this point contravenes the clear intent of the Legislature by allowing a jury to consider evidence of a defendant's wealth.

The majority addresses the issue of "prejudice" by stating: "Juries are presumed to follow the law as instructed by the trial court. There is no reason to assume that the jury would disregard the trial court's instruction on this issue." ___ So. 2d at ___. In other words, the majority appears to be saying that defendants should not be concerned about the danger of prejudice because the trial judge can always instruct the jury to disregard certain evidence after the fact or remedy the error in a jury's hearing any evidence that should not have been heard. This rationale could also support an argument in favor of abolishing all limiting rules of evidence and letting the jury hear any and all evidence, such as hearsay and opinions, regardless of its relevance, trustworthiness, or prejudicial content, because juries are presumed to listen to the trial judge's instructions, and those instructions may direct the jury to unring the bells that were rung by the parties. The majority's approach to evidence endangers the constitutional guarantee of a fair trial.

The foundation of western law is "equal justice under the law." "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness shalt thou judge

thy neighbor." Leviticus 19:15 (King James). The temptation of a jury to ignore this fundamental principle is the reason evidence of a "mighty" defendant's wealth is excluded from consideration by the jury.

I concur in the result as to parts II, III, and IV, but, for the foregoing reasons, I must dissent as to part I.

Life Insurance Company of Georgia v. Daisey L. Johnson

MADDOX, JUSTICE (concurring in part; dissenting in part).

I concur in that portion of the majority opinion that affirms the judgment entered upon the jury verdict, conditioned upon the plaintiff's agreement to remit all but $5,000,000 of the punitive damages awarded.

I also concur in that portion of the opinion that adopts a procedure requiring a bifurcation of trials in cases in which claims for punitive damages are presented to a jury, but I must point out that this is a major procedural change, and I would have preferred that this Court follow the normal practice when adopting procedural changes. By following our usual procedures of giving notice to the bench and bar and other interested parties of such a proposed change in our procedures, such interested persons would have had an opportunity to comment on the proposal before its adoption.

For at least three reasons, I cannot agree with the holding of this Court that establishes a procedure for the distribution of a portion of the punitive damages award to the State. First, I question the power of this Court to direct the payment of damages recovered in a civil case into the General Fund of the State; second, I believe that the Legislature is the proper branch of government to make policy determinations of this magnitude; and third, even if the Court has the power to adopt the procedure under its rule-making power, I would not adopt the procedure without giving notice of the proposal to the parties, the bench and bar, and the public, so that each member of each group would have an opportunity to comment on the proposal.

Before I specifically address the reason for my vote, I offer this preface about the development of the law in this

state relating to damages, especially punitive damages, that can be recovered for breach of a noncommercial contract of insurance. That law has dramatically changed over the past decade or so, and actions such as this one, in which a jury awarded $15,000,000 in punitive damages, have raised some serious policy questions, such as: What type of remedy should be employed when an insurer fails to pay a valid claim made by its insured? What is the measure of damages and to whom should they be paid? What is the proper role of the courts in reviewing jury awards that are claimed to be excessive? Can courts direct the distribution of a punitive damages award? In many of the past cases involving alleged breaches of insurance policies, I had to dissent. I specifically disagreed when the Court selectively struck down most of the so-called "Tort Reform" legislation that was adopted to address some of these issues.

Much of the history of the development of the law that allows juries to assess punitive damages against an insurer is contained in a dissenting opinion I filed in Continental Assur. Co. v. Kountz, 461 So.2d 802, 810 (Ala. 1984) (Maddox, J., dissenting), wherein I discussed the development of the tort of bad faith and why I thought that either this Court or the Legislature should provide an alternative to the tort of bad faith failure to pay a noncommercial insurance claim, by permitting the recovery of attorney fees and consequential damages when a policyholder was forced to go to court to establish entitlement to insurance benefits.[12]

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[12]I realize, of course, this present case does not involve a bad faith failure to pay, but it arose out of a relationship between an insured and an insurer.

In the following sections of this opinion, will specifically state the reasons why I concur in part and why I must also respectfully dissent in part.

I.

First, I will discuss why I concur in that portion of the opinion that conditionally affirms the judgment and orders a remittitur.

Jury awards of punitive damages in Alabama have dramatically increased in Alabama in the last 15 years. See Appendix A, which was included as an appendix to Life of Georgia's brief in this case, and which purports to be based on published reports of cases from Alabama.[13] The substantial amount of those jury awards in Alabama has caused defendants to ask this Court to review the awards and to either grant a new trial or order a remittitur. Many defendants have claimed that the awards of punitive damages by Alabama juries violate their federal constitutional rights and some have appealed these awards to the United States Supreme Court. See, e.g., Aetna v. Lavoie, 475 U.S. 813 (1986); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 932 (1995).

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[13]I would point out that the statistics given by the majority concerning the percentages of cases won and lost by plaintiff attorneys were not in the record of this case. Although the majority cites these statistics to support the proposition that plaintiffs rarely win cases and that their attorneys often lose "the amount [they have] expended in filing the action and in preparing for trial," ____ So.2d at ____, this proposition is persuasive only if one assumes that all these actions represent valid claims. Barring this assumption, these statistics could be used to argue that a large number of frivolous actions are being filed.

The jury award of $15,000,000 is obviously excessive, and the reduction of the judgment to $5,000,000 by this Court still imposes a substantial penalty on the defendant. After reviewing the record, and comparing this judgment to other judgments in similar cases that have been approved by this Court, and after reviewing the defendant's constitutional claims, I concur in the conditional affirmance of the judgment in this case. However, my concurrence is subject to the caveats expressed in this special writing. My reasons are as follows: (1) this was an action alleging fraud, and, although the evidence was conflicting regarding whether a misrepresentation was made, the jury, as the factfinder, determined that a misrepresentation had been made; and, (2) this Court, on other occasions, has approved substantial penalties levied against defendants under similar circumstances. National States Ins. Co. v. Jones, 393 So.2d 1361 (Ala. 1980) (trial judge remitted $3,500,000 jury verdict in an insurance fraud case to $500,000, and this Court affirmed); North Carolina Mut. Life Ins. v. Holley, 533 So.2d 497 (Ala. 1987) ($1,000,000 jury award was subjected to a remittitur of $500,000). I realize that this judgment, even after the remittitur, is substantially higher than the judgments approved in those two prior fraud cases, but, according to the statistics furnished to us by Life of Georgia, which appear in Appendix A to this opinion, judgments of this size and greater have been approved by this Court in the past for similar or less egregious conduct. I personally know that to be true, because I have reviewed the records in many, if not all, of the cases coming before this Court.

I have also examined Life of Georgia's claim that this verdict violates its federal constitutional rights. If I were addressing the federal constitutional question without the benefit of all the decisions of the United States Supreme Court on the question, I would agree that Justice O'Connor, in her dissents in Browning-Ferris Industries v.

Kelco Disposal Inc., 492 U.S. 289 (1989), and TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711 correctly interpreted the provisions of the States Constitution on the issue. Of course, her reasoning did not prevail, and my prediction about what the United States Supreme Court would do in Pacific Mutual Life Ins. Co. v. Haslip, 553 So.2d 537, 544 (Ala. 1989) (Maddox, J., concurring in part; dissenting in part), was incorrect, because the United States Supreme Court affirmed the decision of this Court. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

I have carefully read several of the decisions of the Supreme Court of the United States that address the question of jury awards of punitive damages, and I have read a transcript of the oral arguments in the BMW case, now pending before the United States Supreme Court. Based upon my reading of those cases, and based upon my understanding of the questions asked at oral argument by the Justices in BMW, it appears to me that the Supreme Court of the United States, at this time, requires State justices and judges to review jury awards of punitive damages to ensure that juries do not unreasonably or disproportionately punish a defendant; I have made the required review. It also appears to me that the Supreme Court, in BMW, will address the question whether a State, through a State jury, can punish a defendant not only for misconduct occurring in the State, but also for misconduct occurring outside the State. In BMW, the Court may also address the question whether a defendant, like Life of Georgia in this case, can be punished not once, but twice, for the same or similar misconduct.

On this issue of double punishment, there was evidence presented in this case and of an alleged pattern and practice of fraud that involved policies sold not just in Alabama but in other states as well.[14] This fact was argued to the jury, which very well may have considered other out-of-state transactions in its deliberations; such evidence could have influenced the jury's deliberations and the resulting punitive damages award in this case.[15] The issue of allowing a jury to consider evidence of alleged misconduct occurring outside the State is presented in the BMW appeal, but the Supreme Court of the United States has not addressed it yet.

I cannot predict what the Supreme Court of the United States will do in BMW, so I do not know whether a State can successively punish the same defendant in separate civil cases without violating the Double Jeopardy Clause or the Interstate Commerce Clause of the United States Constitution. I do know that in the oral arguments in BMW some of the Justices asked questions relating to these issues. I also know that, as was true in BMW, separate

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[14]According to the appellant's brief, only one of the witnesses who testified to Life of Georgia's pattern and practice of selling these policies to elderly citizens resided in the State of Alabama. That witness was Mattie Foster, the plaintiff in Foster v. Life Insurance Co. of Georgia, 656 So.2d 333 (Ala. 1994).

[15]Ms. Johnson, the plaintiff in this case, testified in the Hammond/Green Oil hearing at the trial level in Ms. Foster's case (see n. 13) as to what Life of Georgia had done to her, and the plaintiffs in both of these cases were represented by the same attorneys. By allowing punitive damages to be awarded in this case, this Court is allowing the defendant to be punished twice for the same conduct. In the oral arguments in BMW, one of the Justices inquired about just such a factual setting, suggesting that permitting a defendant to be punished by every victim might raise constitutional questions.

juries, based upon the same or similar evidence of misconduct, can reach alarmingly disparate results. In BMW for example, the jury awarded $4 million in punitive damages; but another jury, hearing much of the same evidence about BMW's alleged misconduct presented by the same attorneys, awarded $0 punitive damages. Yates v. BMW of North America, Inc., 642 So.2d 937 (Ala. Civ. App. 1993). In Foster v. Life Ins. Co. of Georgia, 656 So.2d 333 (Ala. 1994), which involved another claimant who alleged the same misconduct as that alleged in this case, and who was represented by the same counsel as represents the plaintiff in this case, the jury awarded Ms. Foster $1 million in punitive damages; the jury in this case awarded the plaintiff $15 million. Such disparate awards give some credence to the claims frequently made by defendants that the system of awarding punitive damages in Alabama is much like a lottery.

It would have been helpful to me in reviewing the excessiveness-of-the-verdict claim to have the decision of Supreme Court of the United States in BMW; that case contains some of the same legal questions that are present here, or similar ones. Even without the benefit of that decision, I know that this Court has said that the award of punitive damages is a civil punishment and is for the purpose of altering the behavior of wrongdoers. See, e.g., Pitt v. Century II, Inc., 631 So.2d 435 (Ala. 1993), Lozier Corp. v. Gray, 624 So.2d 1034 (Ala. 1993, Reserve Nat'l Ins. Co. v. Crowell, 614 So. 2d 1005 (Ala. 1993), cert. denied, ____ U.S. ___, 114 S. Ct. 84 (1993), General Motors Corp. v. Johnston, 592 So.2d 1054 (Ala. 1992), and Maryland Casualty Co. v. Tiffin, 537 So.2d 469 (Ala. 1988). The Supreme Court of the United States has said that the awarding of punitive damages for wrongful actions is a form of state regulation that can be as effective as statutory regulations designed to protect consumers and the general public from similar wrongful actions. See San

Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

When businesses are involved in interstate commerce and punishment is rendered against them, additional questions are raised. During the oral arguments in BMW, one or more of the Justices asked whether "interstate commerce enter[ed] the calculus" of determining whether a particular punishment was prohibited; however, the Court has not yet answered the question. The Supreme Court, in BMW, could very well hold as it held in Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989):

> "[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' . . . . [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."

Even though I have some reservations because I do not have the latest expression from the United States Supreme Court, I concur in the conditional affirmance based on the law that the Supreme Court has set out in several of its opinions, and without benefit of an opinion in the BMW appeal. In some respects this case is similar to TXO, but in another respect it is similar to BMW. Factually, it is most similar to Haslip, except that, in Haslip, as I recall, the

plaintiff did not present as much evidence of a pattern and practice of misconduct as was presented here against this defendant.[16]

II.

I concur with the majority's decision to require a bifurcated proceeding in all cases, except wrongful death cases, where a punitive damages verdict is returned; but, I would have preferred that the Court not adopt the procedure by caselaw. I would have followed our usual procedure of drafting a proposed rule, giving notice to the bench and bar and other interested citizens, and setting a time within which any person could file comments, pro or con, about the rule. The Court, by setting the effective date of the new procedure as three months after the certificate of judgment issues in this case, does offer the bench and bar, and possibly the Legislature, a limited opportunity to address the new procedure; that opportunity is better than none. I do believe such a procedure will be beneficial to juries and to courts that are called upon to review their findings. I have been concerned for some time about allowing juries to fix an amount of exempiary damages and giving them standardless discretion in doing so. In criminal cases, this State took the power to fix penalties from the jury several years ago and vested the power to sentence in the trial judges. Even in capital cases,

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[16]In the present case, evidence of four incidents, including that against the plaintiff, Ms. Johnson, which could constitute evidence of pattern and practice, was presented before the jury, before the trial court in the Hammond/Green Oil review, and before this Court. However, evidence of one of these incidents was presented by Mattie Foster, the plaintiff in Foster v. Life Insurance Co. of Georgia, 656 So.2d 333 (Ala. 1994). In that case, this Court reinstated a jury award for $1 million in punitive damages against Life of Georgia.

the jury can only recommend a sentence to be imposed, after hearing evidence of aggravating and mitigating circumstances; the trial judge is not bound by that recommendation.

I make one further observation. The rule established by the majority opinion excepts wrongful death cases, where only punitive damages can be awarded. Personally, I believe that the Legislature should amend the wrongful death statute to provide for the recovery of compensatory damages, which other jurisdictions allow, but the Legislature, even when adopting the so-called "Tort Reform" package, did not address this issue.

III.

I now come to the portion of the opinion with which I must respectfully disagree. The majority quotes from a special concurrence in BMW, 646 So.2d at 629, and now holds that a plaintiff has no right to recover punitive damages. ___ So.2d at ___. While I agree, in principle, with the Court's holding that punitive damages, in a civil case, are for punishment and that it might be desirable that a portion of the award be paid into the State treasury, I do not believe that this Court has the power, or that it should assume the power, of determining that a portion of an award of punitive damages must be distributed to the State. I believe that the power to collect revenue for the State treasury is a plenary power of the Legislature, and is beyond the powers of this Court.

At least three sections of Alabama's Constitution seem to address this question. Section 42 provides:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided a separate body of magistracy, to wit: Those which are

> legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 43 provides:

> "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

Furthermore, § 70 provides, in part, that "[a]ll bills for raising revenue shall originate in the house of representatives." It is axiomatic that the judiciary declares what the law is, the Legislature what it shall be. Alabama Life Ins. & Trust Co. v. Boykin, 38 Ala. 510 (1863); Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 24 So. 171 (1898); Champion v. McLean, 266 Ala. 103, 95 So. 2d 82 (1957) (the power to make the law has been committed to the legislature by the Constitution, and the only power of the court is to declare the law as enacted by the legislative branch of government).

This Court has addressed the power of courts to deal with fines in Ellis v. State, 502 So. 2d 694 (Ala. 1986). Although I did not agree, this Court held that where a district judge, by court order, imposed a traffic fine of $50.00 over the normal fine because the defendant had a radar detector in the automobile, the judge was legislating, even though the fine was within the statutory limits of § 32-5A-8, in that the judicial action created an additional fine,

which, under § 43 of the Constitution, could be enacted only by the Legislature.[17]

As I stated earlier, I personally would favor a procedure whereby a portion of punitive damages could be paid into the State treasury, because it would address the troublesome issue of a single plaintiff's receiving a "windfall" or winning a "lottery." I would point out that only a few states have adopted a procedure for requiring the prevailing party in a civil case who recovers punitive damages to pay part of the award to the state general fund. Although the majority opinion states that four states have adopted this practice, my research shows that nine states have adopted statutes requiring the payment of a portion of an award of punitive damages to the state government. The states with such punitive damages legislation are: Colorado (Colo. Rev. Stat. § 13-21-102(4) (1987)), Florida (Fla. Stat. § 768.73(2)(b) (1993 Supp.)), Georgia (Ga. Code Ann.§ 51-12-5.1(e)(2) (1993)), Illinois (735 ILCS 5/2-1207), Iowa (Iowa Code § 668A.1(2) (1993)), Missouri (Mo. Rev. Stat. § 537.675(2) (1992 Supp.)), New York (N.Y. Civ. Prac. L. & R. § 8701 (McKinney 1993 Supp.)), Oregon (Or. Rev. Stat. § 18.540(1) (1991)), and Utah (Utah Code Ann. § 78-18-1(3) (1992)). However, the Colorado statute has been held unconstitutional by the Colorado Supreme Court,[18] the Florida statute has been repealed by the

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[17]In Ellis, I opined that the trial judge had sentenced the defendant for speeding, not for possession of a radar detector.

[18]See, Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991). The Colorado Supreme Court held in this opinion that the statute mandating that a portion of punitive damages awards be paid to the state, Colo.Rev.Stat. § 13-21-102(4), was unconstitutional as violating the Taking Clause of the Fifth Amendment of the United States Constitution.

Florida legislature, and a federal district court has declared Georgia's statute unconstitutional.[19] In addition, when Colorado and Florida had such laws in effect, they did not allow the attorney for plaintiff to take a contingency that was to be allocated to the state.[20]

I would point out that some recent decisions of the United States Supreme Court suggest that if a state is the recipient of punitive damages awards, such awards may be subject to judicial scrutiny under the Eighth Amendment's Excessive Fines Clause. The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis added.) Although the majority is correct in its assertion that in Browning-Ferris Industries v. Kelco Disposal Inc., 492 U.S. 257 (1989), the Supreme Court held that the Eighth Amendment did not apply to the award of punitive damages in a civil case between private parties, in my opinion this case suggests that the Excessive Fines Clause might apply to punitive damages awards where the state receives the proceeds of such awards. Specifically, the Court stated:

> "To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the confines of the Clause's reach may be, we now decide only that it does not constrain an award of money

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[19]McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990).

[20]See, Schenck v. Minolta Office Systems, 873 P.2d 18 (Colo. App. 1993); Gordon v. State, 608 So. 2d 800 (Fla. 1992).

> damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history."

Browning-Ferris Industries, 492 U.S. at 263-64. (Emphasis added.)

As indicated by the Court in Browning-Ferris, the history behind the development and adoption of the Eighth Amendment plays an important role in in determining its applicability to awards of punitive damages in cases.[21] "The Eighth Amendment was based directly on Article I § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights." Browning-Ferris, 492 U.S. at 266. In 1689, Parliament required William of Orange to accept the provisions of the Bill of Rights as a condition precedent to offering him the throne. Section 10 of the English Bill of Rights had been adopted in order to curb the excessive use of amercements, which had been generously levied by previous English monarchs. Amercements "were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." 492 U.S. at 269. History suggests that the use of these amercements was to impose penalties for both civil

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[21] See, Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand.L.Rev. 1233 (1987); Jefferies, A Comment on the Constitutionality of Punitive Damages, 72 Va.L.Rev. 139 (1986), for a further discussion of the historical development of the Eighth Amendment.

and criminal wrongs committed, and it seems clear to me that Browning-Ferris would have been decided differently had a portion of the civil fine in that case been paid to the government, because the civil fine then would have been similar, in nature, to "amercements," which were defined in Browning-Ferris as follows:

> "Amercements were an 'all-purpose' royal penalty; they were used not only against plaintiffs who failed to follow complex rules of pleadings and against defendants who today would be liable in tort, but also against an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties."

492 U.S. at 269.

History suggests that because of the numerous abuses that occurred from the use of amercements both Magna Carta and the English Bill of Rights placed restraints on their imposition. Based on the historical development of the Eighth Amendment, the Supreme Court, in Browning-Ferris ruled that the amendment's primary purpose was to curb governmental action, rather than to place restraints on the awards given in civil actions between private parties.[22]

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[22]The narrowness of the holding in Browning-Ferris seems apparent from a statement made by Justice O'Connor in her concurring/dissenting opinion in that case, where she cites a Florida statute (Fla. Stat. § 768.73(2)(b), which has since been repealed by the Florida Legislature, effective July 1, 1995), which mandated that 60% of any punitive damages awarded be allocated to the state. In reference to this statute, Justice O'Connor stated:

> I also note that by relying so heavily on the distinction between governmental involvement and purely private

[Footnote continued on next page]

492 U.S. at 268. In addressing "governmental" versus "private" action, the Court stated that "the text of the [Eighth] Amendment points to an intent to deal with the prosecutorial powers of the government." Browning-Ferris, 492 U.S. at 275. (Emphasis added.) The Court held that the Excessive Fines Clause did not apply to the punitive damages award in the civil case before it, because the state had not "used its civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 492 U.S. at 275. (Emphasis added.) The Court warned, however, that the Excessive Fines Clause might apply in cases where punitive damages were awarded and a state government either has "prosecuted the action" or "has any right to receive a share of the damages awarded." 492 U.S. at 264. (Emphasis added.) Consequently, there is little doubt in my mind that the decision the Court makes today means that future attacks on punitive damages awarded in this state in civil cases after the effective date of the allocation procedure established by this opinion, will probably be subject to an analysis under the Excessive Fines Clause of the Eighth Amendment. In summary, it appears to me that the decision in Browning-Ferris suggests that where a sovereign "has [a] right to receive a share of the damages awarded," even in a civil case, an Eighth Amendment analysis might be appropriate. 492 U.S. at 264. I am of this opinion

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[Footnote continued from previous page]

> suits, the Court suggests that the Excessive Fines Clause will place some limitations on awards of punitive damages that are recovered by a governmental entity."

492 U.S. 298-99.

because the Court observed, in holding that the Eighth Amendment was intended only to restrain governmental action, that when the Eighth Amendment was adopted the word "fine" was "understood to mean payment to the sovereign as punishment for some offense." Browning-Ferris, 492 U.S. at 265.

By analyzing the holding in Browning-Ferris, I do not mean to suggest that the Legislature of Alabama could not require the payment of a portion of punitive damages to the State General Fund, because I believe that it could; however, whether the fine is paid to the State by court order or by statute, I believe the amount of any fine in any given case would be subject to an analysis under the Excessive Fines Clause of the Eighth Amendment.

Although the Double Jeopardy Clause of the United States Constitution probably will not be held to apply to a purely civil case, that rule might change if a portion of a punitive damages award is paid to the state. Cf. United States v. Halper, 490 U.S. 435 (1989), where the Court held that the constitutional prohibition of double jeopardy required the reduction of a civil award rendered in favor of the United States against a defendant who had previously been subject to criminal sanctions for the same conduct. The Court in Halper discussed whether a civil award could be construed as placing a defendant in double jeopardy, and said:

> "[I]n determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not underlying nature of the proceeding giving rise to the sanction, that must be evaluated."

Halper, 490 U.S. at 447, n. 7. The Court announced that the purpose of the award is controlling under this analysis,

rather than whether the action was pursued in a civil or in a criminal context:

> "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the action as applied in the individual case serves the goal of punishment."

490 U.S. at 448.

Some of the questions I raise about punishing a defendant more than once may be answered by the Supreme Court in BMW, which is now pending before it, but, whether that Court answers these questions or not, it appears to me that punitive damages are penal in nature and that all the safeguards of both the Alabama Constitution and the United States Constitution would apply. I do know that the Supreme Court of the United States has elected to grant

certiorari review, and to write opinions, in at least three cases from this state in the past few years in which the question of excessive punitive damages awards was addressed. I would also point out that my suggestion of adopting a rule that would provide for the recovery of extracontractual damages in insurance cases, including attorney fees, would be preferable and fairer to the litigants, and would not result in the possibility that the attorney for the plaintiff might recover more than the plaintiff and the state, if 50% of the award (after expenses and attorney fees) went to the State, as the majority opinion allows. Another reason why I think compensatory damages, including extracontractual damages, would be preferable to a rule that permits the recovery of punitive damages, is that such a rule would eliminate problems about "windfalls" to one plaintiff and would remove most of the legal problems that could develop when questions of double punishment arise.[23] I know further that in its most recent expression on punitive damages, that Court stated in Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S.Ct. 2331 (1994), the following:

> "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury

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[23]The attorney for the plaintiff in this case argued to the jury in the Foster case, and again to the jury in this case, that Life of Georgia should be punished for selling these policies to elderly people. The question arises: How many times can a defendant be punished through exemplary damages? In BMW, the Justices, during oral arguments, made specific inquiry about the "multiplier" effect of permitting several plaintiffs to argue similar claims to separate juries. Cf., Dennis Neil Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala.L.Rev. 1 (1991).

> instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express bias against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger."

___ U.S. at ___ , 114 S.Ct. at 2340-41.

Summary

On several occasions I have suggested that the Legislature should consider adopting legislation that would protect both the consumer and the insurer in these noncommercial insurance cases. If the statistics appearing in Appendix A are correct, and I have no reason to doubt them, the State of Alabama seems to be out of line with neighboring states in regard to the amount of punitive damages awarded. It appears to me that the legislative branch is the proper forum for addressing any problem that does exist and for making the policy choices that must be made. This suggestion on my part is not new. I first suggested it in my dissenting opinion in Kountz, where I stated that "in our scheme of government, policy questions like [those presented in a bad- faith-failure-to-pay case], especially since they involve the heavily regulated insurance industry, should properly be addressed by the Legislature." 461 So.2d at 812. In that dissent, I also stated why I thought this Court should consider a rule allowing extracontractual damages, suggesting that there very well might be instances when insurance companies pay claims that factually should have been denied, but the company opted to pay the claim rather than face the possibility of a lawsuit. I also

suggested that if punitive damages awards in those instances do occur, then premiums for all other policyholders necessarily rise to offset these added costs. On the other hand, I also stated that the proliferation of lawsuits and the size of the jury verdicts suggested consumer dissatisfaction with some practices that were occurring. No doubt, there are instances when companies require policyholders to resort to a lawsuit, even though the insurer's factual basis for denying a claim is questionable. I have previously stated that "[t]he fairest rule, . . . in view of these two policy considerations, would be [a procedure] which would allow any party to a noncommercial insurance contract, who is forced to go to court in order to recover his contract claim, to recover his consequential damages as well, including reasonable attorneys' fees." Kountz, 461 So.2d at 813.

Although the imposition of punitive damages can punish and deter, it would appear to me that ideally the legislative branch should make the regulations, and that the executive branch should enforce them fairly, to effect the regulatory purpose of protecting the public welfare. See my opinion in Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1056 (Ala. 1987), where I specially concurred and suggested the Legislature should address the public policy concerns relating to punitive damages.

Comments directed specifically to the action on application for rehearing

On original deliverance, I concurred in that portion of the majority opinion affirming the judgment conditionally upon the plaintiff's agreement to remit all but $5,000,000 of the punitive damages awarded, and in that portion of the opinion that adopted a procedure requiring a bifurcation of trials in cases in which claims for punitive damages are presented to a jury. I did so even though I pointed out that

this Court generally gives notice to the Bench and Bar before adopting such a substantial change in civil procedure. I still concur as to those two holdings. However, I dissented from that portion of the opinion that establishes the policy of allocating 50% of all punitive damages awards, less attorney fees, to the state's general fund, and I expressed concerns over the constitutional implications raised by this decision. I still dissent in that regard. Because I believe that the rehearing applicants and the amici curiae have raised many meritorious arguments in their applications and briefs in support thereof, I must respectfully dissent from the majority's refusal to address many of the important issues raised on rehearing.

Life of Georgia applied for a rehearing on December 1, 1995, and it has been supported in its position by amicus curiae briefs from the Alabama Defense Lawyers Association; the State of Alabama; Blue Cross and Blue Shield of Alabama; Alabama Gas Corporation; Alfa Insurance Company; the Chamber of Commerce of the United States; the Product Liability Advisory Council, Inc.; USX Corporation; the University of Alabama Health Services Foundation, P.C.; Amerex Corporation; and the Wausau Insurance Companies. Life of Georgia and the amici raise several substantial questions, and they point out why the procedure adopted in this case is not only confusing, but also violates Life of Georgia's constitutional rights, both state and federal.

The plaintiff has also filed an application for rehearing. Her application is supported by amicus briefs from the

Alabama Trial Lawyers Association and an individual named Mary Lambeth[24].

Although the majority, no doubt persuaded by the excellent and well-reasoned arguments advanced by both the parties and the amici curiae, has modified the opinion to change the effective date of this caselaw and has cleared up some of the confusion in the original opinion regarding when the new procedure would take effect and which cases would be affected, the majority has not addressed some of the basic constitutional arguments pertaining to separation of powers of government and the legal effect of paying into the general fund of the state a portion of the punitive damages.

I do not separately address the arguments that Life of Georgia and the amici make, but they include substantial legal issues, especially regarding federal constitutional law. I set out some of these concerns in the main portion of my dissent and I do not restate them here.

There is now pending before the United States Supreme Court a case from this Court styled BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 932 (1995), in which the petitioner has raised some of the same arguments that are made by Life of Georgia in its application for rehearing. I would have preferred to have the United States Supreme Court's latest expression on the federal constitutional issues raised in BMW before acting on this application for rehearing. My views are that the Eighth Amendment could be implicated where a portion of the punitive damages

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[24]Mary Lambeth is the plaintiff in a federal action based on the Alabama Wrongful Death Act. Her federal claim involves alleged asbestos exposure.

award goes to the state and that there could be federal constitutional violations where multiple penalties are imposed against a corporation for the same wrongful conduct, where, as here, the wrongful conduct has already been considered in setting the penalty in another case; the wrongful conduct dealt with in this case was considered in Foster v. Life of Georgia, 656 So. 2d 333 (Ala. 1993) (this Court reinstated a $1 million punitive damages judgment against Life of Georgia for the same conduct complained of in this case). Having read the opinions rendered by the United States Supreme Court and having considered the questions the Justices of that Court are asking during oral arguments in cases involving punitive damages and multiple parties, some of whom may be located outside the forum state, I believe that the judgment in this case presents serious constitutional questions that should be fully answered. See, Honda Motor Corp. v. Oberg, ___ U.S. ___, 114 S. Ct. 2331 (1994); TXO Production Corp. v. Alliance Resources Corp., ___ U.S. ___ 113 S.Ct. 2711 (1993); Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 289 (1989). Cf. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 804-08 (1987) (the United States Supreme Court held that counsel for a party that benefits financially from a federal court order may not be appointed as prosecutor in a contempt action alleging a violation of that order). See also, Kennedy v. Mendoz-Martinez, 372 U.S. 144 (1963), which addresses the issue of quasi-criminal statutes.

For these reasons and those stated in the main part of this opinion, I must respectfully dissent from the majority's refusal to address most of the issues raised in the applications for rehearing.

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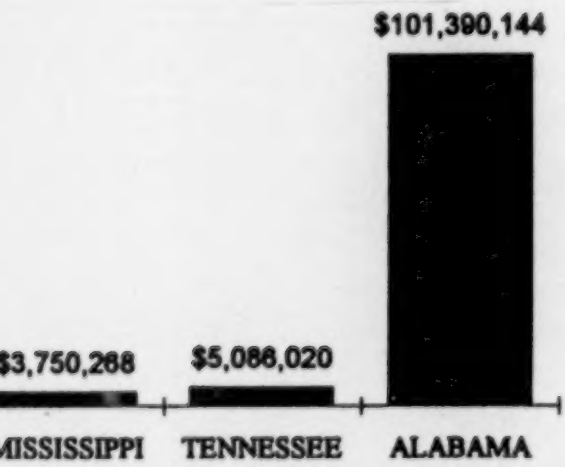

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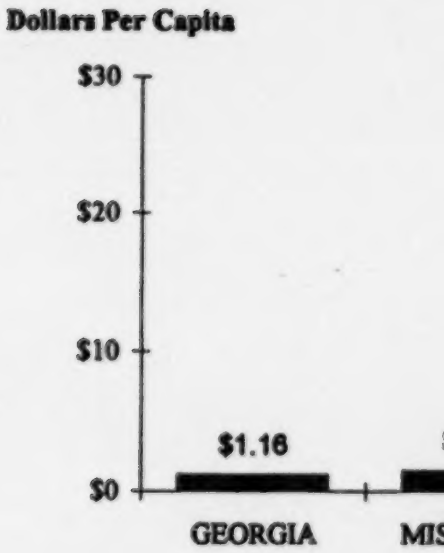

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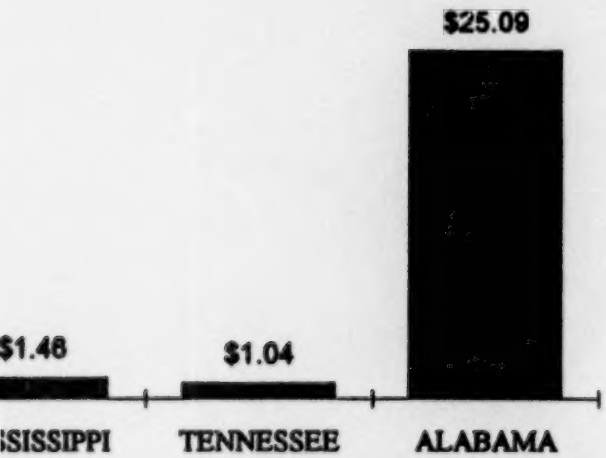

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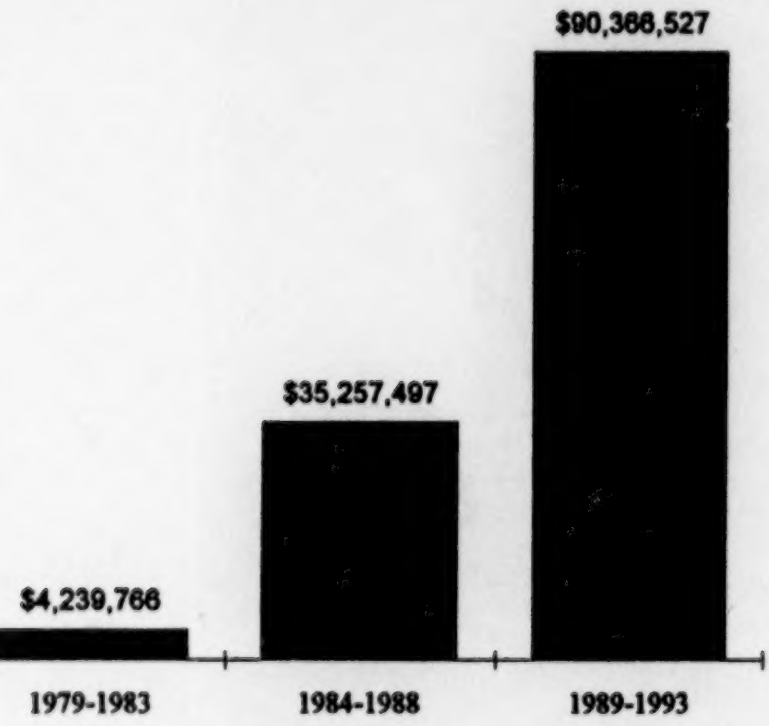

Note: Total does not include general awards that did not differentiate between compensatory and punitive damages

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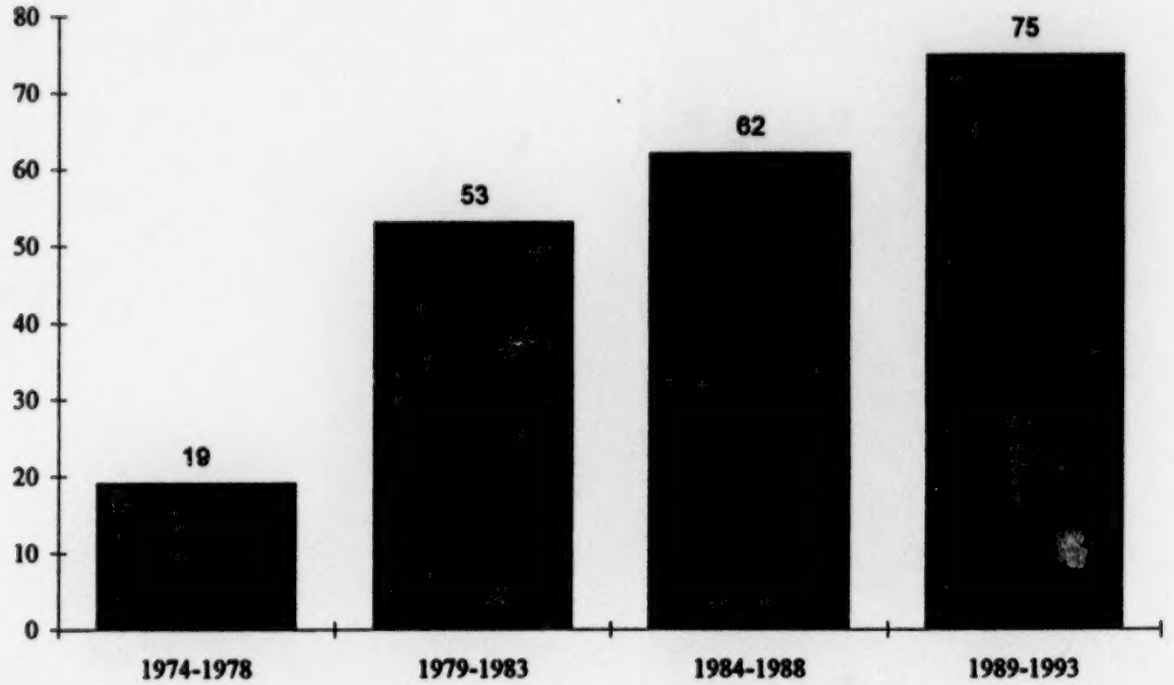

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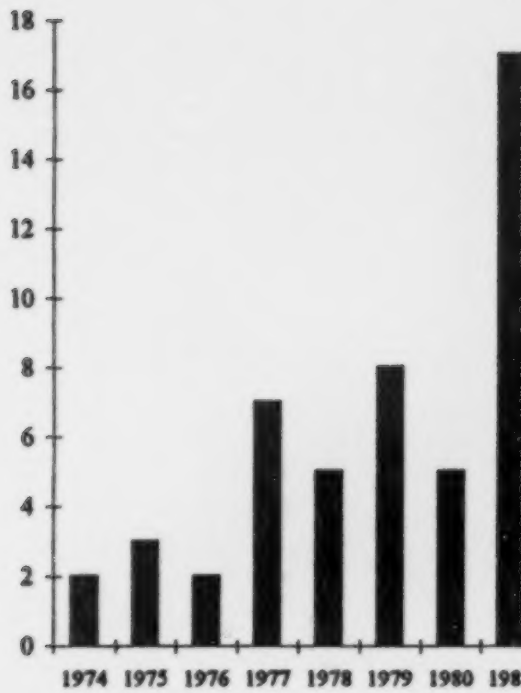

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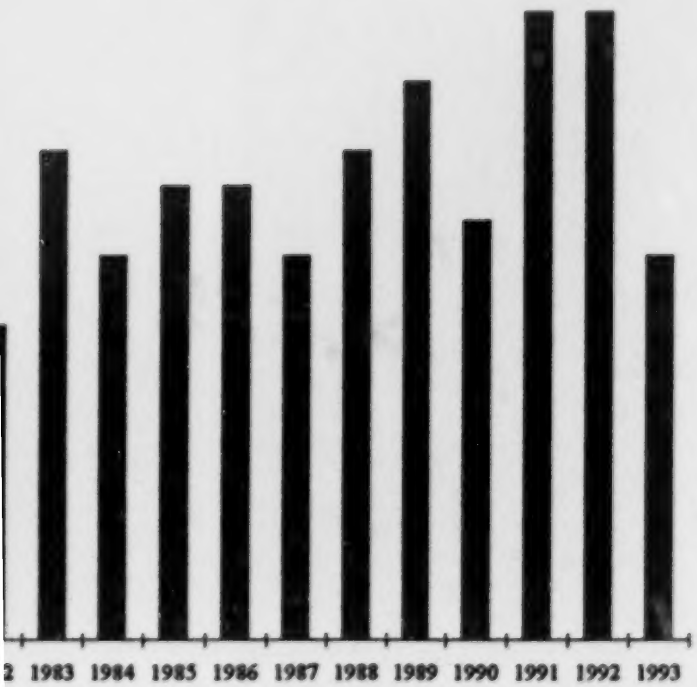

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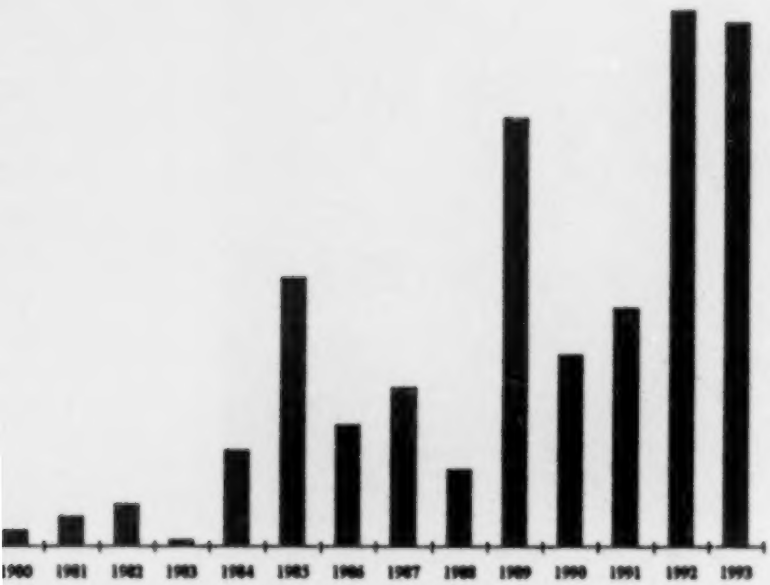
1974 - 1993



Note: Total does not include general awards that did not differentiate between compensatory and punitive damages

Life Insurance Company of Georgia v. Johnson

BUTTS, JUSTICE (concurring in part and dissenting in part).

I.

I concur in the establishment of a bifurcated trial in cases where a plaintiff seeks punitive damages from a defendant. I believe such a procedural change is within this Court's authority, pursuant to Ala. Code 1975, § 12-2-7. See Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986); Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989). However, I would add several caveats.

The majority's opinion states that in the punitive damages portion of the trial, the jury is to be informed of the factors set forth in Ala. Code 1975, § 6-11-23, Hammond, Green Oil, and other case law. ___ So.2d at ___ . As a former circuit court judge, I believe that submitting facts and information from other cases, perhaps in an attempt by opposing attorneys to establish the amount of punitive damages awarded by other juries in "comparable cases," will be more confusing and time-consuming than it will be helpful.

Further, taking the Green Oil rule, the majority will have the jury informed of the plaintiff's costs of litigation, including attorney fees. I would either delete this requirement or require that the jury also be informed of the defendant's costs of litigation, including attorney fees.

II.

I respectfully dissent from the majority's holding requiring apportionment of a punitive damages award between the plaintiff and the State. It is for the legislature to determine whether a portion of a punitive damages award should be paid to the State and, if so, what percentage of

the award the State should receive, and it is for the legislature to determine the State fund or agency to which the monetary award should be allotted.

III.

As the majority notes, lawsuits and jury awards of punitive damages have become virtually the only effective weapon people have to deter powerful entities from conducting tortious activities within this State. This condition has arisen because the State of Alabama lacks strong consumer protection laws and because the State agencies whose duty it is to enforce the existing body of laws are woefully underfunded. For example, Alabama's Insurance Department, with a scant budget of less than $2 million, a staff of fewer than 30 professional employees, including only 4 consumer protection specialists, is responsible for regulating Alabama's $6 billion insurance industry, composed of 1100 companies.[25]

It is clear that Alabama needs stronger consumer protection laws and a realistic means to enforce them. The majority has now established that that portion of punitive damages allocated to the State will be paid into the General Fund. Common sense dictates, however, that the apportionment should be used to attack the underlying problem at its source. I believe that, if there is to be an apportionment to the State, it should be used to expand and strengthen the department or agency that polices the industry being punished. For example, in a case such as this, where an insurance company is found guilty of consumer fraud, the apportionment should be paid to the

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[25]Jerry Underwood, "Big Money Fight," Birmingham News, November 5, 1995, at 8A.

Alabama Department of Insurance. The punitive damages award would then become a meaningful investment in deterrence, rather than an unconditional gift to the State's General Fund.

WL961930.029/12

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1995-96

1940357

Life Insurance Company of Georgia

v.

Daisey L. Johnson

Appeal from Mobile Circuit Court
(CV-93-969)

SHORES, JUSTICE.

Daisey L. Johnson sued Life Insurance Company of Georgia ("Life of Georgia"), alleging that it had engaged in intentional and reckless fraud and fraudulent suppression by selling her a Medicare supplement insurance policy that was worthless to her because she was eligible for Medicaid. The jury returned a verdict in favor of Ms. Johnson, assessing compensatory damages at $250,000 and punitive damages at $15,000,000. Life of Georgia moved for a new trial or for a remittitur of damages. The trial judge held a

hearing pursuant to Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). Following the hearing, the trial judge reduced the punitive damages award to $12,500,000, pursuant to Ala. Code 1975, § 6-11-21, and this remittitur was accepted by the plaintiff. Life of Georgia appeals.

Daisey Johnson, a resident of Grove Hill, Alabama, is an 84-year-old woman who went through the third grade in school and who spent her life as a domestic worker. Because Ms. Johnson had dealt with Life of Georgia for over 25 years, paying premiums on nine different policies, she trusted its agents. Sometime before January 8, 1990, a Life of Georgia agent, Barbara Holt, came to Ms. Johnson's home to collect the monthly premiums on her existing policies. Ms. Holt recommended that Ms. Johnson purchase a Medicare supplement policy. The next week Ms. Holt returned and again discussed the Medicare supplement policy with Ms. Johnson, who agreed to purchase the policy. Ms. Johnson testified that Ms. Holt told her that the Medicare supplement policy would protect her. She testified: "If I got in the hospital, you wouldn't have to worry about your doctor bill, you could stay in there because they would pay your doctor bill, and I got it." Ms. Holt filled out the application for Ms. Johnson.

At first, Barbara Holt testified that she asked Ms. Johnson for her social Security card; later, she testified that she asked Ms. Johnson for her Medicaid card and that she asked the questions on the application, one of which was whether Ms. Johnson was on Medicaid. At trial, Ms. Johnson disputed Ms. Holt's testimony that she was asked whether she was on Medicaid. Ms. Johnson showed the jury how she gave her cards to Ms. Holt by pulling a vinyl holder out of her purse. She testified that she always

kept her cards in this vinyl holder, which contained her Medicaid, Medicare, and Social Security cards.

Despite the fact that Ms. Holt knew that it was illegal and against company policy to sell a Medicare supplement policy to Ms. Johnson because she was on Medicaid, Ms. Holt completed the application and collected the premiums on the policy. Initially the premiums were $71 per month; by 1992, they had risen to $103 -- almost one-third of Ms. Johnson's fixed income. Over almost a three-year period from 1990 through 1992, Ms. Johnson paid a total of $3,132 in premiums.

Life of Georgia first argues that it was entitled to a directed verdict or to a judgment notwithstanding the verdict, with respect to the award of punitive damages because, it argues, the plaintiff failed to prove by clear and convincing evidence that the company "consciously or deliberately engaged in oppression, fraud, wantonness, or malice" as is required by § 6-11-20, Ala. Code 1975, for the award of punitive damages. The statute provides:

> "§ 6-11-20. Punitive damages not to be awarded other than where clear and convincing evidence proven; definitions.
>
> "(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages

which is not now present under the law of the State of Alabama.

"(b) As used in this article, the following definitions shall apply:

"(1) Fraud. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

"(2) Malice. The intentional doing of a wrongful act without just cause or excuse, either:

"a. With an intent to injure the person or property of another person or entity, or

"b. Under such circumstances that the law will imply an evil intent.

"(3) Wantonness. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

"(4) Clear and convincing evidence. Evidence that, when

> weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

The standard of review applicable to a directed verdict or to a denial of a motion for a directed verdict is whether the nonmoving party presented substantial evidence in support of his or her position. If not, then a directed verdict is proper. Bailey v. Avera, 560 So. 2d 1038, 1039 (Ala. 1990). A verdict is properly directed only where there is a complete absence of proof on a material issue or where there are no disputed questions of fact for the jury to determine. Woodruff v. Johnson, 560 So. 2d 1040, 1041 (Ala. 1990); K.S. v. Carr, 618 So. 2d 707, 713 (Ala. 1993). Life of Georgia argues strenuously that the evidence was not sufficient to meet this clear and convincing standard; however, it admits that the evidence was in sharp conflict.

In this case, the trial judge denied Life of Georgia's motion for a directed verdict because he was satisfied that the plaintiff had presented a jury question with regard to the issue of punitive damages. He stated in his Hammond order:

> "Clear and convincing evidence was presented at trial that Life of Georgia was aware of the fraudulent sale of these

> Medicare supplement policies. . . . Plaintiff further produced clear and convincing evidence through the testimony of three live pattern witnesses that Life of Georgia's conduct in selling these policies to elderly, uneducated, single black women was not an isolated event and had not ceased and these people were paying a very substantial portion of their fixed income for useless policies. Evidence was presented at trial that Life of Georgia was aware of the unfitness of its agent in selling this specialized type policy. Eric Peek testified that he trained Barbara Holt for Life of Georgia yet gave her no training relative to the Medicare Supplement policies because he himself did not receive training to enable him to understand and properly sell these policies. Evidence was presented at trial that Life of Georgia began marketing the Medicare supplement policies in 1986 and that continuing through the date of the verdict in June of 1994, Life of Georgia had done nothing to ferret out and correct the problem. In fact, Life of Georgia's corporate officers testified during the Plaintiff's presentation of her case that Life of Georgia had done nothing to try to prevent the sale of Medicare supplement policies to unqualified persons, even though in 1992 Life of Georgia had been faced with trial in Mobile County and experienced an adverse verdict. . . ."

The trial judge then instructed the jury that, pursuant to § 6-1-20, it must be satisfied by "clear and convincing evidence" of the plaintiff's allegations before it could return

a punitive damages award. In the Hammond order, the trial judge recited the proof presented by the plaintiff as to her dealings with agent Barbara Holt in regard to the Medicare supplement policy:

> "Plaintiff proved that Life of Georgia's agent, Barbara Holt, misrepresented to her that she needed health insurance under a Medicare supplement policy in order to pay her hospital and medical bills should she become sick. There was ample and substantial evidence that Plaintiff showed Barbara Holt her Medicaid card and that Barbara Holt knew or should have known that Plaintiff did not qualify for the insurance since she was a Medicaid recipient. Plaintiff proved that Barbara Holt was not properly trained to be aware of circumstances where elderly persons living on low fixed income such as Daisey Johnson have coverage under both Medicare and Medicaid. This lack of awareness permeated Life of Georgia's entire corporate structure as the vice president in charge of marketing and training, Robert Hayes, gave uncontradicted testimony that he too would 'assume' that if someone was on Medicare they did not have Medicaid. Plaintiff proved that over 116,000 Alabamians have both Medicare and Medicaid. This lack of training and awareness fostered both intentional and reckless misconduct on behalf of its agents, including Barbara Holt. Plaintiff discovered, after hearing about a similar situation involving Mattie Foster and Life of Georgia, that she had been sold a Medicare

> supplement policy she did not need and was useless to her. Plaintiff's proof that Life of Georgia was aware of the situation where unqualified elderly people living on fixed income were sold this Medicare supplement policy yet did nothing to prevent or detect such wrongful conduct distinguishes this case from 'renegade agent' cases. Life of Georgia played an active role in allowing Barbara Holt to sell the policy in question and continue to collect the premiums."

When the evidence meets the "sufficiency" test, jury verdicts are presumed correct, and this presumption is strengthened by the trial court's denial of a motion for new trial. Therefore, a judgment based upon a jury verdict and sustained by the denial of a post-judgment motion for a new trial will not be reversed on the ground that it is against the weight of the evidence unless, it is plainly and palpably wrong. Alpine Bay Resorts, Inc. v. Wyatt, 539 So.2d 160, 162 (Ala. 1988); Ashbee v. Brock, 510 So.2d 214 (Ala. 1987); Jawad v. Granade, 497 So.2d 471 (Ala. 1986). Having carefully studied the lengthy record, we conclude that there was substantial evidence before the jury to support the plaintiff's claim.

Life of Georgia next contends that the trial court erred in admitting what it calls "highly improper, prejudicial and inflammatory evidence" with respect to the plaintiff's claim that Life of Georgia was negligent and wanton in its training of its agents. The company contends that the only reason the plaintiff pursued the negligent and wanton training claim was to introduce evidence that would prejudice and bias the jury against the company. This argument disregards the Alabama statute on vicarious liability, § 6-11-27, Ala. Code 1975, and the strong proof

required under this statute. The common law rule of vicarious liability is modified by § 6-11-27; this Code section requires a higher degree of proof of culpability on the part of the principal before punitive damages can be imposed against the principal for the conduct of its agent. Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d 384, 390 (Ala. 1993). This Court noted this modification in Sheridan and commented: "Thus, as a logical matter, if plaintiffs can meet the statutory requirement for vicarious liability, they will, in many cases, also have established the elements of their claims for wantonness in the hiring and supervision of the agent." Id. In this case, the plaintiff's evidence relating to her claim that Life of Georgia negligently and wantonly trained its agents was directly related to her fraud claim. Because the plaintiff was required to prove a higher degree of culpability on the part of Life of Georgia to bind it for the acts of its agent, the trial court did not err in admitting this evidence. Id.

Next, Life of Georgia argues that it is entitled to a remittitur of the $250,000 compensatory award, on the grounds that the award grossly exceeds plaintiff's "mental anguish" damages and her $3,132 out-of-pocket loss. Life of Georgia contends that the only evidence presented by the plaintiff concerning her mental state, upon learning that the insurance policy she had paid on for almost three years was worthless, was "that it made her angry" and that it "worried" her. The record reflects that this is not an accurate picture of her testimony. Ms. Johnson testified that after she learned that she had been paying the premiums on a worthless insurance policy, she could not sleep and her meal schedule was disrupted. Her testimony that she ran two insurance agents off her property, telling them "to leave -- leave out of my yard and don't come back" is evidence from which the jury could conclude that Ms. Johnson was distressed to learn that she had been

paying for a worthless policy and that she had suffered mental anguish as a result. The jury listened to her evidence and concluded that she had suffered emotionally as a result of the company's conduct. "[T]here [is no] yardstick to measure the amount of recompense which should be awarded for. . . mental suffering." Birmingham Electric Co. v. Thompson, 251 Ala. 465, 466, 37 So. 2d 633, 634 (1948).

The trial judge also reviewed the evidence presented by the plaintiff concerning her claim for mental anguish. He concluded: "Ample evidence was presented at trial which supports the total compensatory damages award of $250,000 against Life of Georgia." This Court has said that the trial judge has much discretion in determining whether to grant a new trial and whether to require a remittitur of damages for mental anguish. Crown Life Ins. Co. v. Smith, 657 So. 2d 821 (Ala. 1994); Fields v. Parker, 361 So. 2d 356 (Ala. 1978). We find no abuse of discretion on his part in denying the motion for a new trial and in refusing to remit the award for compensatory damages, based upon the evidence before him. Pitt v. Century II, Inc., 631 So. 2d 235, 239 (Ala. 1993).

Finally, we come to the question of the imposition of punitive damages. Life of Georgia, a tortfeasor that has been found by this jury to be guilty of conduct for which the law permits the imposition of punitive damages, argues that its rights have been unconstitutionally impinged upon by the imposition of such damages. Over the years the constitutional arguments advanced in efforts to eliminate or to cap punitive damages awards have taken different forms. It has been argued that the excessive fines provisions of the state and federal constitutions forbid the imposition of punitive damages. Kumar v. Lewis, 561 So. 2d 1082 (Ala. 1990); Industrial Chemical & Fiberglass Corp. v.

Chandler, 547 So. 2d 812 (Ala. 1988); Alabama Power Co v. Turner, 575 So. 2d 551 (Ala. 1991) cert. denied 500 U.S. 953 (1991). This argument was rejected by the United States Supreme Court in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989), and has largely been abandoned. See Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). More recently, the due process provisions of the Fourteenth Amendment have been the basis of constitutional challenges, as in this case, where Life of Georgia argues that the award of punitive damages is so grossly excessive and fundamentally unfair that it contravenes Alabama law and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See Intercontinental Ins. Co. v. Lindblom, 571 So. 2d 1092 (Ala. 1990). It is also frequently argued that, under Alabama law, juries are provided too few standards for determining a verdict appropriate both to punish the defendant, whose conduct inflicted harm upon the victim, and also to deter others from engaging in similar conduct, without completely destroying the defendant financially. Aetna Ins. Co. v. Lavoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L.Ed.2d 823 (1986).

These arguments have been carefully considered by this Court. The standards set forth in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), were adopted partly in response to these concerns. These cases require the trial court, after the jury returns a verdict that the defendant claims to be excessive, to consider all relevant factors bearing on the issue of excessiveness when viewed from the perspective of the defendant. The factors set out in Hammond and Green Oil are not intended to be all-inclusive. Trial judges are encouraged to consider any

evidence that has any relevance to the question of the fairness and justness of the jury verdict.

In this case, a jury found that Life of Georgia had defrauded an elderly Alabama citizen, and there was evidence that she was not the only Alabama victim of such fraud. The evidence established, and a jury has found, that the conduct of Life of Georgia justifies requiring it to pay a substantial sum of money as punitive damages. The trial judge has considered evidence offered in a post-verdict hearing pursuant to Hammond and Green Oil. After that hearing, the trial judge ordered a remittitur and explained his order, remitting the $15,000,000 punitive damages award to $12,500,000, as follows:

> "This Court is mindful that this verdict is large. Yet this Court finds that a punitive damages award of $12,500,000 bears a reasonable relationship to the harm that is likely to occur from Life of Georgia's conduct as well as to the harm that actually has occurred. The harm which was committed is even more egregious because Life of Georgia refuses to admit or concede any wrongdoing whatsoever and merely [attributes] the sale of this policy [to] a 'miscommunication.' Life of Georgia has profited from such 'miscommunications.'
>
> "This Court finds that the economic impact of the verdict on Defendant Life of Georgia is slight. In 1993, the company had assets exceeding $2.3 billion. Investment income alone totaled $173 million for 1993 and the company has over billion in reserve. The company has testified that it has sufficient resources to pay the judgment if it

should be affirmed. The financial position of Life of Georgia does not support any reduction in this verdict.

"The Court finds that the verdict should be high in order to encourage a plaintiff such as this, and her attorneys, to pursue this type of case. The Court is of the opinion that there are many people situated such as Plaintiff who are unable due to sickness, age, infirmity or whatever to pursue such a case. The Court has considered whether the cost of this litigation favors remittitur and is of the opinion that this factor does not weigh in favor of reducing this verdict.

"The Court has compared this verdict to other verdicts affirmed by the Alabama Supreme Court, including Northwestern Mutual Life Insurance Co. v. Sheridan, [630 So. 2d 384 (Ala. 1993)]. The Court is mindful that the $15 million punitive award is $2,500,000.00 larger than that amount affirmed in Sheridan, which is the largest punitive damages award in a fraud case ever affirmed by our Supreme Court. The Court has compared the facts of the Sheridan case, as set forth in the Supreme Court's opinion, and the facts of this case. The Court is clearly convinced that the wrongful conduct in this case is much worse. The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income. Life of Georgia knew that these

types of individuals were easily persuaded, and used sales techniques such as 'fear' to sell these policies. The Court further compared this verdict to other verdicts similar in nature. Nevertheless, although this Court is of the opinion that the facts in this case are much worse than those in the Sheridan case, the Court is of the opinion that the punitive award in this case should be reduced by $2.5 million so as to not exceed the largest punitive award affirmed by our Supreme Court.

"Next, the president of Life of Georgia testified that Life of Georgia ceased doing business in Alabama and would never return. He also testified that if any policyholder of Life of Georgia had been sold a Medicare supplement policy who had received Medicaid benefits, that person's premiums would be immediately refunded. He further stated that Life of Georgia had undertaken a program in Alabama to determine whether there were any policyholders situated such as Daisey Johnson. However, the Court is aware that following the testimony of Life of Georgia's president, a witness testified by deposition for Plaintiff that her 91-year-old father was on Medicaid, had been sold a Medicare supplement policy, and that she had demanded Life of Georgia to return his premiums. Ms. Pernell, the daughter of the person sold the Medicare supplement policy, was informed by Life of Georgia that they would not refund the premiums. This

testimony contradicts that of the president and concerns the Court as to the qualify of Life of Georgia's assertion that it would refund premiums once an unqualified policyholder came forward.

"It is the conclusion of this Court that the verdict was not based upon bias, passion, prejudice, corruption, or other improper motive, but instead was the product of the jury's careful and studious consideration of the evidence and applicable law. This conclusion is based in part on this Court's observing . . . all of the parties to the trial, the respective attorneys, and the jury and its reaction to all of the others. The jury was justified in awarding these damages to punish Life of Georgia and to prevent similar wrongs in the future. The imposition of these damages in this case creates a strong incentive for vigilance on the part of all insurance companies doing business in this state. The jury arrived at an amount that it considered necessary to vindicate the public interest by eliminating the reprehensible conduct of this defendant and in punishing it appropriately. This verdict is not so large that goes beyond an amount necessary to accomplish these goals. This verdict will have little, if any, impact upon Life of Georgia and other insurance companies unless it is substantial . . . ."

The trial judge's order demonstrates that he focused on the conduct of Life of Georgia to determine whether the punishment was excessive in relationship to that conduct.

The trial judge also considered the public policy upon which punitive damages are based: to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct. The trial court remitted the award to an amount that it determined, from an examination of the facts specific to the defendant, was not excessive; the court determined that the reduced award is not so large as to destroy the defendant, but is large enough to serve the public policy of punishment and deterrence.

Alabama citizens who become the victims of fraud have little recourse other than through litigation. The record in this case is replete with expert testimony to the effect that the State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have. Punitive damages have historically part of the remedy for such victims, and to get that remedy they must prove that the defendant intentionally inflicted the injury for which punishment is sought. As Jonathan Massey, writing recently in Trial magazine explained, punitive damages have been used "to help equalize the playing field between the powerful and the powerless -- whether between king and subject, railroad and passenger, or corporation and consumer." "Why Tradition Supports Punitive Damages: and How the Defense Bar Misreads History," Trial, September 1995 p. 19. Massey continues:

> "Punitive damages awards in consumer fraud and products liability cases are within the historical tradition of tort law for an even more fundamental reason: Punitive damages have traditionally been used as a populist weapon to help level the playing field between powerless plaintiffs

and powerful defendants. As the U.S. Supreme Court observed in an 1886 case,

> "'The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, if they are to be not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition. [Barry v. Edmunds, 116 U.S. 550, 556 (emphasis added)].'

"In common law England, punitive damages were often employed against the crown and the aristocracy. In 19th-century America, they were frequently used against railroads and robber barons. As the Pennsylvania Supreme Court observed in 1886, 'The liability of railway and other corporations to exemplary damages for gross negligence is well settled.' [Lake Shore & Michigan S. Ry. v. Rosenzweig, 113 Pa. 510, 544, 6 A. 545 (1886)].

"The modern-day heir of this populist legacy is the consumer plaintiff suing a large corporate defendant. Using punitive damages to redress the imbalance in the relationship between consumer and

> corporation is squarely within their historical tradition."

Id. at pp. 24-27.

Attorneys who represent victims of fraud, such as the fraud practiced upon this plaintiff, bear all of the expense of the litigation and carry all of the risk of failure. They are reimbursed only if the victim recovers from the wrongdoer. The lawyer takes a significant risk in such cases. According to Business Week magazine,[1] plaintiffs today are losing a greater proportion of cases that go to trial than in past years; in 1988 plaintiffs won 63% of the cases that went to trial, but in 1992 plaintiffs won only 54%. This Business Week statistic is supported by a United States Justice Department Survey[2] the country's 75 most populous counties, which concluded that in 1992 only 2% of the 762,000 cases disposed of in those counties were decided by juries, and that plaintiffs won in only 52% of cases.[3]

Statistics indicate that most cases produce no money damages at all for plaintiffs or their lawyers. For example, here in Alabama, the overwhelming majority of the civil cases decided by this Court in 1994 (345 cases) were cases

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[1]"Corporate America's fear of juries may be overblown," Business Week, November 8, 1993.

[2]"Civil Jury Cases and Verdicts in Large Counties" is a joint project of the Bureau of Justice Statistics and the National Center for State Courts.

[3]Richard C. Reuben, "Plaintiffs Rarely Win Punitives, Study Says," A.B.A. Journal, p. 26, October 1995.

in which monetary damages were sought, but not awarded. Monetary damages had been awarded in only 114 cases taken on direct appeal to this Court. This is only 7% of the total number of cases that this Court handled.

On a national level, American Bar Association statistics show that personal injury claims represent only 9% of the civil caseload in this country. Since 1986, personal injury cases have remained essentially flat on the scale, while domestic relations matters have increased by 43%.[4]

There are also many cases that are concluded by the entry of a summary judgment for the defendant. Cases decided by summary judgments formed the largest category of civil cases decided by this Court in 1994, 47.6%. Eighty-three percent of those cases were affirmed by this Court, either in whole or in part. In all of these cases, the plaintiff's lawyer loses the amount she or he has expended in filing the action and in preparing for trial.

Litigation is slow and costly and carries no guarantee of success. Victims of fraud bear the burden of proving to the satisfaction of a jury of 12 citizens that they have been victimized by the defendant. It is a heavy burden, and litigation is an inefficient way to stop fraudulent conduct -- one lawsuit at a time, brought by one victim at a time -- but it provides the only recourse a defrauded citizen of Alabama has.

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[4]Statistics according to the State Court Caseload Statistics Annual Report 1992 published February report is a joint project of the Conference of State Court Administrators, the State Justice Institute, and the National Center for State Courts Court Statistics Project.

The question whether setting standards for post-trial review of a jury's verdict is sufficient to provide due process, while allowing the jury discretion to determine punitive damages, has been much discussed. Under our present procedure, the jury, before rendering its verdict, never hears whether the amount it selects as the appropriate amount for punishing the defendant and deterring others from similar conduct is actually an appropriate amount, considering the factors that trial courts and appellate courts must consider in reviewing jury verdicts (i.e., the Hammond and Green Oil factors). In some cases, the plaintiff or defendant may offer evidence that the acts complained of resulted in profit to the defendant in a specific amount. In some cases the evidence might show how much or how little it would have cost the defendant to remedy a defect in a product or to change its method of doing business, but, in most cases, it could be argued that the jury has incomplete information from which to determine with certainty the amount that is appropriate to serve the ends for which punitive damages were intended. Under our present procedure, much evidence relevant to reaching a decision as to an appropriate amount to punish the particular defendant is withheld from the jury. To reach a verdict and to fix an amount of punitive damages, the jury may consider only the character of the defendant's conduct and the degree of wrong as shown by the evidence in the case. These strictures on the evidence that the jury may consider in awarding punitive damages result from concern that both evidence of the defendant's wealth or the defendant's lack of wealth and also other evidence that is relevant, if not critical, to the issue the jury is asked to decide must be excluded because such evidence could potentially influence the jury to the prejudice of one party or another. We have concluded, after much deliberation, that the need for more guidance for the jury in these cases outweighs the concern that such evidence might prejudice

the jury. Juries are presumed to follow the law as instructed by the trial court. There is no reason to assume that the jury would disregard the trial court's instructions on this issue.

Separating the fact-finding process for adjudging liability and compensatory damages from the damages-assessment process in a punitive damages case and, at the same time, improving the reliability of the punitive damages-assessment process is a procedural goal that was recognized by Justice Jones in his special concurrence in Ridout's-Brown Service, Inc. v. Holloway, 397 So.2d 195 (Ala. 1981), as adopted by this Court in Green Oil Co. v. Hornsby, supra. Justice Houston, concurring specially in Charter Hosp. of Mobile, Inc. v. Weinberg, 558 So.2d 909 (Ala. 1990), expressed his opinion that the due process provisions of the constitution are violated when the jury is "given the unbridled discretion to award no punitive damages or to award an unlimited amount of punitive damages, taking into consideration only the character and the degree of the wrong as shown by the evidence in the case and the necessity of preventing similar wrongs in the future." 558 So. 2d at 917. Justice Houston then set out a procedure providing for a bifurcated trial as a way to ensure due process:

> "Therefore, I would recommend that the following procedure be applied in all jury cases involving claims for punitive damages and as to which claims a party had a right to trial by jury at common law prior to the adoption of the first Alabama Constitution . . . .
>
> "A jury will determine the issues of liability, the amount of compensatory damages, and whether the defendant's

conduct warrants the imposition of punitive damages. In addition to other jury verdict forms, in common law cases involving punitive damages the following jury verdict form should be given to a jury for each party against whom punitive damages are sought:

> "'In accordance with the instructions given to us by the trial court, we find that punitive damages (should) (should not) be assessed against (name of party against whom punitive damages are sought).'

"In the event that the jury determines that punitive damages should be imposed against one or more defendants, the trial will resume; and evidence of the following, which was not admissible in the trial in chief, shall be admissible upon an offer by any party in accordance with the rules of evidence.*

"Evidence of the harm that was likely to occur from the defendant's conduct as well as the harm that actually has occurred is relevant. The jury should be instructed that, it finds that the actual and likely harm is slight, the punitive damages (subject to the other factors hereinafter set out) should be relatively small. If the actual harm and/or likely harm was grievous, the punitive damages (subject to the other factors hereinafter set out) should be much greater.

"The duration of the defendant's conduct, the degree of the defendant's awareness of any hazard that his conduct has caused or is likely to cause, any concealment or 'cover-up' of that hazard, and the existence and frequency of similar conduct of the defendant are relevant. The jury should be instructed that if it finds that the defendant's offensive conduct was of long duration or was frequently repeated; that the defendant acted with awareness that his conduct was causing or was likely to cause the hazard by which the plaintiff was in fact damaged; or that the defendant concealed or covered up that hazard, then such a finding should increase the amount of punitive damages.

"The profitability of conduct to the defendant is relevant. The jury should be instructed that the punitive damages should remove all profit from the wrongful conduct and should be in excess of the profit, so that the damages would 'sting.'

"The financial position of the defendant is relevant. The jury should be instructed that the amount of punitive damages should 'sting' the defendant, considering his financial condition.

"All costs of the litigation, including the attorney fees to be paid to the plaintiff's attorney, are relevant; and the jury should be instructed that its award should include all reasonable costs of litigation, so as to

encourage injured parties to bring wrongdoers to trial.

"If criminal sanctions have been imposed on the defendant for his conduct, this is relevant; and the jury should be instructed that such criminal sanctions should be taken into account in mitigation of the punitive damages award.

"If there have been other civil actions against the defendant based on the same conduct and if punitive damages have been assessed against the defendant in those civil actions, this is relevant; and the jury should be instructed that it should consider this in mitigation of the punitive damages award.

"I believe that, if these factors are considered by a jury in assessing the amount of punitive damages a defendant should pay, this will improve the reliability of the punitive damages assessment process and will fit the punishment to the offensive conduct of the offender. I believe that by doing this in a bifurcated trial the court could preserve the reliability of the fact-finding process for adjudging liability, thereby accomplishing the goal we set in Green Oil Co. v. Hornsby, supra, when we adopted Justice Jones's special concurrence in Ridout's-Brown Service, Inc. v. Holloway, [397 So.2d 125, 127-28 (Ala. 1981)]

> "*A bifurcated trial is also recommended by the American College of Trial Lawyers, 'Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice' (March 3, 1989), pp. 18-19."

558 So.2d at 917-18.

I. Bifurcation

We hold that hereafter in all cases where punitive damages are sought, excluding actions based upon wrongful death, in which a trial is commenced three months or more after the certificate of judgment issues in this case, the trial shall be bifurcated in accordance with the procedure set out in Justice Houston's special concurrence in Charter Hospital v. Weinberg, supra. The trial court shall charge the jury on the appropriate law, and the jury shall first determine liability and the amount of compensatory damages, if any. The jury will also decide by special verdict whether the evidence justifies the imposition of punitive damages. If the jury answers the special verdict in the affirmative, the trial shall resume.

In the second part of the bifurcated trial, the parties shall be permitted to introduce all evidence, financial or otherwise, that is relevant to the question of what amount the verdict should be to accomplish the purpose punitive damages were designed to serve. All evidence presently admissible at a post-verdict Hammond/Green Oil hearing may be introduced before the jury retires to consider its punitive damages verdict. The jury is to be guided not only by the factors set forth in Hammond and Green Oil, but also by those factors stated in the statute and in other case law. Davis Carr, writing in the Alabama Lawyer, has

offered the following compilation of factors, drawn from both case law and statute, that can be considered:

> "From the statute [§ 6-11-23, Ala. Code 1975 1989)]:
>
> "1. Nature, extent and 'economic impact' of verdict on plaintiff or defendant.
> "2. Amount of compensatory damages.
> "3. Whether defendant has been guilty of similar acts in the past.
> "4. The nature and extent of any effort by defendant to remedy the wrong.
>
> "From Green Oil:
>
> "1. Does the punitive damages award bear a reasonable relationship to the harm likely to occur from the defendant's conduct?
> "2. The degree of reprehensibility of defendant's conduct, including:
> "(a) the duration of this conduct;
> "(b) the degree of defendant's awareness of any hazard which this conduct has caused or is likely to cause;
> "(c) any concealment or cover-up of the hazard;
> "(d) existence and frequency of similar past conduct.
> "3. Punitive damages should remove the profit, if any, from the defendant and should be in excess of the profit so that defendant recognizes a loss.
> "4. Defendant's 'financial

position.'

"5. Cost of litigation to the plaintiff.

"6. If defendant has received criminal sanctions, that should be taken into account in mitigation.

"7. If there have been other civil actions against the same defendant based on the same conduct, this should be taken into account in mitigation of the punitive damages.

"From Hammond:

"1. Culpability of defendant's conduct.

"2. The desirability of discouraging others.

"3. 'The impact' on the parties.

"4. 'Impact' on innocent third parties.

"From Holloway [Ridout's-Brown Service, Inc. v. Holloway, 397 So.2d 125, 127 (Ala. 1981)]:

> "The punitive damages award should sting, but ordinarily it should not destroy.

"From Wilson Dukona Corp. N.V., 547 So.2d 70 at 73 (Ala. 1989)]:

> "Defendant's 'right to fair punishment' must be considered above plaintiff's right to recover the fullest amount of punitive damages.

"From Lavoie [Aetna Life Ins. Co. v. Lavoie, 505 So.2d 1050 at 1053 (Ala. 1987]:

> "'A comparative analysis with other awards in similar cases.'"[5]

The adoption of this bifurcated procedure is not a substitute for post-trial procedures for reviewing punitive damages awards. These awards, when challenged as excessive or inadequate, still must be considered through the procedures set out in Green Oil Co. v. Hornsby, supra, and Hammond v. City of Gadsden, supra. However, the evidence need not be readmitted in any post-verdict hearing on the question of excessiveness. Only such evidence as was not available for consideration by the jury that bears on the issue of excessiveness will be admitted in a post-verdict hearing on excessiveness. The trial courts must continue to review jury verdicts not only for excessiveness, but also to determine the validity of other challenges to jury verdicts. After this procedure is put in place, it can no longer be said that juries are left with no guidance in determining an appropriate punitive award.

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[5]Davis Carr, "Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?" Ala. Lawyer, Vol. 51, March 1990, pp. 94-95. Mr. Carr's article carried the following note: "As to this listing factors, the author hereby acknowledges 'limited plagiarism' from a handout by Danner Frazer, Jr., 'How to Handle a Post-Judgment Punitive Damage Hearing -- Discovery to End,' presented at the Alabama Defense Lawyers Association fall meeting, 1989."

II. Allocation

Much of the criticism surrounding the issue of punitive damages has been based on the perception punitive damages awards sometimes amount to an undeserved windfall to the prevailing plaintiff. Chief Justice Rehnquist has suggested that the windfall effect could be avoided by requiring the losing defendant to pay the punitive award "to the State, not to plaintiff -- who by hypothesis is fully compensated." Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, C.J., dissenting). Such broad power to shape and effectuate remedies is deeply rooted in the common law system. Eisenberg and Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

Some states have passed statutes that allocate punitive damages and require that a portion of each punitive damages award be paid to the state general fund or some special fund that serves a public purpose. Fuller v. Preferred Risk Life Ins. Co., 557 2d 878, 887 (Ala. 1991). For example, Illinois[6] and Iowa[7] allocate punitive damages pursuant to statute. Florida[8] and Colorado[9] passed such statutes in 1987; these were both repealed, effective 1995.

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[6]Ill.Rev.Stat. Ch. 110, para. 2-1207 (Supp. 1987); now cited as Ill.St.Ch. 735 § 5/2-1207.

[7]Iowa Code Ann. § 668A.1(2)(b) (West Supp. 1987).

[8]Fla.Stat.Ann. § 768.73(2) (West Supp. 1987); held constitutional in Gordon v. State, 608 So.2d 800 (Fla. 1991); repealed by Laws 1992, c. 92-85, § 3, effective July 1, 1995.

A special concurrence in Preferred Risk, 577 So.2d at 886, suggested that if a court concludes that the amount of punitive damages awarded is not so excessive as to deprive the defendant of property in contravention of § 13 of the Alabama Constitution of 1901, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the court, nevertheless, may also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to devote a part of the amount to such purposes as the court may determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future. This viewpoint was again expressed by three Justices in Smith v. States General Life Ins. Co., 592 So.2d 1021, 1025 (Ala. 1992), and in special concurrences in Principal Financial Group v. Thomas, 585 So.2d 816, 819 (Ala. 1991) (with Shores, Houston, and Steagall, J.J., joining), cert. denied, 502 U.S. 1009 (1991); Southern Life & Health Ins. Co. v. Turner, 586 So.2d 854, 859 (Ala. 1991); Union Mortgage Co. v. Barlow, 595 So.2d 1335, 1348 (Ala. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 301, 121 L.Ed.2d 224 (1992); BMW of North America, Inc. v. Gore, 646 So.2d 619, 629 (Ala. 1994).

[Footnote continued from previous page]

[9]Colo.Rev.Stat. § 13-21-102(4) (1987); held unconstitutional in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991), because a judgment for exemplary damages qualifies as a property interest under Colorado law (there is no right to punitive damages under Alabama law); repealed by Laws 1995, H.B. 95-1090, § 1, effective March 9, 1995.

In a special concurrence in BMW of North America, Inc. v. Gore, supra, a Justice views a procedure that directs a substantial portion of punitive damages awards to the state general fund or some special fund that serves a public purpose as a means of both avoiding the windfall effect and strengthening the jury system:

> "In the name of all that is fair, I ask this Court, which has consistently held that plaintiffs have no right to punitive damages, to direct that all or a substantial portion of punitive damages awarded in civil cases, after deducting attorney fees and expenses of litigation, be paid to the state general fund or to some special fund that serves a public purpose or advances the cause of justice. If this is done, then the time-honored and constitutionally mandated right to trial by jury will not be perceived, insofar as punitive damages is concerned, as Alabama's lottery, as it is now perceived by so many."

646 So.2d at 631. We agree, and we now hold that a part of the punitive damages award in this case and in similar cases hereafter shall be paid into the state general fund. It is appropriate and fair that some part of the civil fine imposed by juries in the form of punitive damages awards should be devoted to the general welfare of all the citizens of Alabama. We believe that this practice will strengthen the public's confidence in our civil justice system because, under this procedure, wrongdoers can be appropriately discouraged from inflicting harm upon others without inappropriately rewarding the victim.

Hereafter, all punitive damages judgments that have not been paid and satisfied shall be allocated as follows: After any post-verdict review is concluded by the trial court, and

after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff's attorney fees, paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State General Fund.

III. Judicial Review of Jury Verdicts in General

Under our system of government, with its guarantee of separation of powers between the executive, legislative, and judicial branches of government, it is peculiarly and exclusively the function of the judiciary to determine whether a jury award in a civil case exceeds the amount that the state and federal constitutions will allow without violating the due process rights guaranteed to all citizens of this state and country. Armstrong v. Roger's Outdoor Shorts Inc., 581 So.2d 414, 419 (Ala. 1991). The separation of powers provision, found in Article III, § 42, of the Alabama Constitution of 1901, provides:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive to another, and those which are judicial to another."

Section 43 reads:

> "In the government of this state, except in the instances in this Constitution, hereinafter expressly directed or permitted,

> the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

In Armstrong v. Roger's Outdoor Sports, we held certain statutes, which attempted to remove all presumption of correctness from a jury verdict and from a trial court's judgment, to be unconstitutional as a violation of the separation of powers provisions of the Alabama Constitution, Article III, §§ 42 and 43.[10] Armstrong, 581 So. 2d at 421. In Armstrong v. Roger's Outdoor Sports we quoted with approval Cobb v. Malone, 92 Ala. 630, 9 So. 738 (1891):

> "'The power to set aside verdicts has been generally regarded in this country as inherent in courts organized upon the principles of common law, though in some States it is regulated by statute, enumerating the grounds upon which a motion for a new trial may be made. The power is essential to prevent irreparable injustice in cases where a verdict wholly wrong is the result of

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[10]In Armstrong, we wrote: "In summary, we hold that § 6-11-23(a), § 6-11-24(a), and the parenthetical phrase in the last sentence of § 6-11-23(b) are unconstitutional. Section 6-11-24(b) and the remaining portion of § 6-11-23(b) are constitutional as construed herein." 581 So. 2d at 421.

> inadvertence, forgetfulness, or intentional or capricious disregard of the testimony, or of bias or prejudice, on the part of juries, which sometimes occurs. . . .'"

581 So. 2d at 419.

In two other cases, this Court had held that statutes enacted by the legislature violated the right-to-jury-trial provisions of the Alabama Constitution. In Moore v. Mobile Infirmary Ass'n, 592 So.2d 156 (Ala. 1991), this Court held that § 6-5-544(b), Ala. Code 1975, which limited the amount of "noneconomic" damages recoverable in a medical malpractice action, violated the right to by jury as guaranteed by Article I, § 11, of the Alabama Constitution 1901. This section provides "[t]hat the right of trial by jury shall remain inviolate." Then, in Henderson v. Alabama Co., 627 So.2d 878 (Ala. 1993), this Court held that a limitation on punitive damages, such as that imposed by § 6-11-21, clearly impairs the traditional function of the jury, thus violating the right to trial by jury guaranteed by Article I, § 11. In those cases, we said that, under an analysis of § 11, the pertinent question is not whether the right still exists under the statute, but whether it still remains inviolate. 627 2d at 885 (quoting Alford v. State Attorney General, 170 Ala. 178, 197, 54 So. 218 (1910)). Because the majority was convinced that the statutes violated the right-to-jury-trial provision of the Alabama Constitution, it was not necessary in those cases to decide whether those statutes also violated the separation of powers provisions of the Alabama and United States Constitutions. However, it is arguable that these statutes did violate the separation of powers provisions.

Because, under the separation of powers provisions, it is the inherent and exclusive power of the judiciary to determine whether a jury award in a civil case exceeds the

amount that the state and federal constitutions will allow without violating due process rights, the trial judge in this case, in a post-verdict Hammond hearing, weighed the question whether the jury had followed its instructions on the law, as well as whether the verdict was the result of passion or bias in favor of, or against, either side in the litigation. After so doing, he ordered a remittitur of the $15,000,000 award of punitive damages to $12,500,000.

IV. Appellate Review in this Case

We have independently reviewed the evidence in this case, applying the factors set forth in Green Oil v. Hornsby, 539 So.2d 218, 223-24 (Ala. 1989), cited in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), and quoted in Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So, 2d 384, including:

> "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against

> the defendant for the same conduct, these also to be taken in mitigation.' Haslip, 499 U.S. at 21-22, 111 S. Ct. at 1045."

Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d at 393.

We conclude, as did the trial judge, that the conduct of this defendant was egregious and reprehensible and resulted in a great financial hardship to some of the most vulnerable members of our society. Life of Georgia fraudulently sold policies to people on Medicaid that were totally worthless to the victims of the fraud. Life of Georgia had no risk under these fraudulently sold policies. The practice was a sham and would never have been permitted in this state if the activities of insurance agents were properly regulated. However, as reprehensible as Life of Georgia's conduct was, it is not the most odorous this Court has been required to review. Without in any way condoning the conduct, we nevertheless are compelled, when comparing this conduct with other acts perpetrated upon Alabama citizens, to reduce the award against the defendant Life of Georgia to $5 million. Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991). It is the opinion of this Court that $5 million is not excessive for punishment and deterrence specific to Life of Georgia, considering all of the facts of this case.

Summary of Holdings

I. Bifurcation

The trial of all cases in which punitive damages are sought, excluding causes of action based upon wrongful death, in which a trial commences three months after the certificate of judgment issues in this case, shall be

bifurcated. The jury shall first determine liability and the amount of compensatory damages, if any. If the jury finds the defendant liable, it will also decide, by a special verdict, whether the evidence justifies the imposition of punitive damages. If the jury answers the special verdict in the affirmative, the trial shall resume.

In the second part of all evidence shall be admitted that is relevant to the question of what amount would be appropriate to accomplish the purpose punitive damages were designed to serve. All evidence that has heretofore been admissible at post-verdict Hammond/Green Oil hearings, can be introduced under this new procedure, before the jury retires to consider its punitive damages verdict. This new procedure is intended to allow the jury to decide, based upon all the evidence that is relevant to that inquiry, the award that the specific defendant before the jury should be required to pay as punishment. If the punitive verdict is challenged in a post-verdict motion as excessive or inadequate, it must still be considered by the trial judge through the procedures set out in Green Oil Co. v. Hornsby, supra, and Hammond v. City of Gadsden, supra.

II. Allocation

Hereafter, all punitive damages judgments that have not been paid and satisfied shall be allocated as follows: After any post-verdict review is concluded by the trial court, and after appellate review, if any, the amount of the judgment as finally determined shall be paid into the trial court. The trial court shall order all reasonable expenses of the litigation, including the plaintiff's attorney fees, paid. The trial court shall then order the clerk of the court to divide the remaining amount equally between the plaintiff and the State General Fund.

III. Reduction of the Punitive Award

The award of $12.5 million in punitive damages is reduced to $5 million.

Judgment

The judgment entered on the jury's award of compensatory damages in this case is affirmed. The award of punitive damages is reduced to $5 million. The trial court is directed to distribute that award in accordance with the allocation established in this opinion. If the plaintiff does not, within 28 days of the date of this opinion, file in this Court a remittitur of $7.5 million, then the defendant shall be granted a new trial.

AFFIRMED CONDITIONALLY WITH DIRECTIONS.

Almon, Houston, Kennedy, Ingram, and Cook, J.J., concur.

Hooper, C.J., concurs in the result as to each holding.

Maddox, and Butts, J.J., concur in part and dissent in part, each with opinion.

Life Insurance Company of Georgia v. Daisey L. Johnson

MADDOX, JUSTICE (concurring in part; dissenting in part).

I concur in that portion of the majority opinion that affirms the judgment entered upon the jury verdict, conditioned upon the plaintiff's agreement to remit all but $5,000,000 of the punitive damages awarded.

I also concur in that portion of the opinion that adopts a procedure requiring a bifurcation of trials in cases in which claims for punitive damages are presented to a jury, but I must point out that this is a major procedural change, and I would have preferred that this Court follow the normal practice when adopting procedural changes. By following our usual procedures of giving notice to the bench and bar and other interested parties of such a proposed change in our procedures, such interested persons would have had an opportunity to comment on the proposal before its adoption.

For at least three reasons, I cannot agree with the holding of this Court that establishes a procedure for the distribution of a portion of the punitive damages award to the State. First, I question the power of this Court to direct the payment of damages recovered in a civil case into the General Fund of the State; second, I believe that the Legislature is the proper branch of government to make policy determinations of this magnitude; and third, even if the Court has the power to adopt the procedure under its rule-making power, I would not adopt the procedure without giving notice of the proposal to the parties, the bench and bar, and the public, so that each member of each group would have an opportunity to comment on the proposal.

Before I specifically address the reason for my vote, I offer this preface about the development of the law in this state relating to damages, especially punitive damages, that can be recovered for breach of a noncommercial contract of insurance. That law has dramatically changed over past decade or so, and actions, such as this one, in which a jury awarded $15,000,000 in punitive damages, have raised some serious policy questions, such as: What type of remedy should be employed when an insurer fails to pay a valid claim made by its insured? What is the measure of damages and to whom should they be paid? What is the proper role of the courts in reviewing jury awards that are claimed to be excessive? Can courts direct distribution of a punitive damages award? In many of the past cases involving an alleged breach of insurance policies, I had to dissent. I specifically disagreed when the Court selectively struck down most of the so-called "Tort Reform" legislation that was adopted to address some of these issues.

Much of the history of the development of the law that allows juries to assess punitive damages against an insurer is contained in a dissenting opinion I filed in Continental Assur. Co. v. Kountz, 461 So.2d 802, 810 (Ala. 1984) (Maddox, J., dissenting), wherein I discussed the development of the tort of bad faith and why I thought that either this Court or the Legislature should provide an alternative to the tort of bad faith failure to pay a noncommercial insurance claim, by permitting the recovery of attorney fees and consequential damages when a

policyholder was forced to go to court to establish entitlement to insurance benefits.[11]

In the following sections of this opinion, I will specifically state the reasons why I concur, in part, and why I must also respectfully dissent, in part.

I.

First, I will discuss why I concur in that portion of the opinion that conditionally affirms the judgment and orders a remittitur.

Jury awards of punitive damages in Alabama have dramatically increased in Alabama in the last 15 years. See Appendix A, which was included as an appendix to Life of Georgia's brief in this case, and which purports to be based on published reports of cases from Alabama.[12] The substantial amount of those jury awards in Alabama has

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[11]I realize, of course, present case does not involve a bad faith failure to pay, but it arose out of a relationship between an insured and an insurer.

[12]I would point out that the statistics given by the majority concerning the percentages of cases won and lost by plaintiff attorneys, were not in the record of this case. Although the majority cites these statistics to support the proposition that plaintiffs rarely win cases and that their attorneys often lose "the amount [they have] expended in filing the action and in preparing for trial," ___ So.2d at ___, this proposition is persuasive only if one assumes that all these actions represent valid claims. Barring this assumption, these statistics could be used to argue that a large number of frivolous actions are being filed.

caused defendants to ask this Court to review the awards and to either grant a new trial or order a remittitur. Many defendants have claimed that the awards of punitive damages by Alabama juries violate their federal constitutional rights and some have appealed these awards to the United States Supreme Court. See, e.g., Aetna v. Lavoie, 475 U.S. 813 (1986); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 932 (1995).

The jury award of $15,000,000 is obviously excessive, and the reduction of the judgment to $5,000,000 by this Court still imposes a substantial penalty on the defendant. After reviewing the record, and comparing this judgment to other judgments in similar cases that have been approved by this Court, and after reviewing the defendant's constitutional claims, I concur in the conditional affirmance of the judgment in this case. However, my concurrence is subject to the caveats expressed in this special writing. My reasons are as follows: (1) this was an action alleging fraud, and although the evidence was conflicting regarding whether a misrepresentation was made, the jury, as the factfinder, determined that a misrepresentation had been made; and, (2) this Court, on other occasions, has approved substantial penalties levied against defendants under similar circumstances. National States Ins. Co. v. Jones, 393 So.2d 1361 (Ala. 1980) (trial judge remitted $3,500,000 jury verdict in an insurance fraud case to $500,000, and this Court affirmed); North Carolina Mut. Life Ins. v. Holley, 533 So.2d 497 (Ala. 1987) ($1,000,000 jury award was subjected to a remittitur of $500,000). I realize that this judgment, even after the remittitur, is substantially higher than the judgments approved in those two prior fraud cases, but, according to the statistics furnished to us by Life of Georgia which appear in Appendix A to this

opinion, judgments of this size and more have been approved by this Court in the past for similar or less egregious conduct. I personally know that to be true, because I have reviewed the records in many, if not all, of the cases coming before this Court.

I have also examined Life of Georgia's claim that this verdict violates its federal constitutional rights. If I were addressing the federal constitutional question without the benefit of all the decisions of the United States Supreme Court on the question, I believe that Justice O'Connor, in her dissents in Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 289 (1989), and TXO Production Cord. v. Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711 (1993), correctly interpreted the provisions of the United States Constitution on the issue. Of course, her reasoning did not prevail, and my prediction about what the United States Supreme Court would do in Pacific Mutual Life Ins. Co. v. Haslip, 553 So.2d 537, 544 (Ala. 1989) (Maddox, J., concurring in part; dissenting in part), was incorrect, because the United States Supreme Court affirmed the decision of this Court. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

I have carefully read several of the decisions of the Supreme Court of the United States that address the question of jury awards of punitive damages, and I have read a transcript of the oral arguments in the BMW case, now pending before the United States Supreme Court. Based upon my reading of those cases, and based upon my understanding of the questions asked at oral argument by the Justices in BMW, it appears to me that the Supreme Court of the United States, at this time, requires State justices and judges to review jury awards of punitive damages to insure that juries do not unreasonably or disproportionately punish a defendant; I have made the

required review. It also appears to me that the Supreme Court, in BMW, will address the question whether a State, through a State jury, can punish a defendant not only for misconduct occurring in the State, but also for misconduct occurring outside the State. In BMW, the Court may also address the question whether a defendant, like Life of Georgia in this case, can be punished not once, but twice, for the same or similar misconduct.

On this issue of double punishment, there was evidence presented in this case of an alleged pattern and practice of fraud that involved policies sold, not just in Alabama but in other states as well.[13] This fact was argued to the jury, which very well may have considered other out-of-state transactions in their deliberations; such evidence could have influenced the jury's deliberations and the resulting punitive damages award in this case.[14] The issue of allowing a jury to consider evidence of alleged misconduct outside the State

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[13]According to the appellant's brief, only one of the witnesses who testified to Life of Georgia's pattern and practice of selling these policies to elderly citizens resided in the State of Alabama. That witness was Mattie Foster, the plaintiff in Foster v. Life Insurance Co. of Georgia, 656 So.2d 333 (Ala. 1994).

[14]Ms. Johnson, the plaintiff in this case, testified in the Hammond/Green Oil hearing at the trial level in Ms. Foster's case (see n. 3) as to what Life of Georgia had done to her, and the plaintiffs in both of these cases were represented by the same attorneys. By allowing punitive damages to be awarded in this case, this Court is allowing the defendant to be punished twice for the same conduct. In the oral arguments in BMW, one of the Justices inquired about just such a factual setting, suggesting that permitting a defendant to be punished by every victim might raise constitutional questions.

is presented in the BMW appeal, but the Supreme Court of the United States has not addressed it yet.

I cannot predict what the Supreme Court of the United States will do in BMW, so I do not know whether a State can successively punish the same defendant in separate civil cases without violating the Double Jeopardy clause or the Interstate Commerce clause of the United States Constitution. I do know that some of the Justices asked questions relating to the issues in the oral arguments in BMW. I also know that, as was true in BMW, separate juries, based upon the same or similar evidence of misconduct, can reach alarmingly disparate results. In BMW for example, the jury awarded $4 million in punitive damages; but another jury, hearing much of the same evidence about BMW's alleged misconduct presented by the same attorneys, awarded $0 punitive damages. Ex parte Yates (re: Yates v. BMW of North America, Inc.), 642 So.2d 937 (Ala. Civ. App. 1993). In Foster v. Ins. Co. of Georgia, 656 So.2d 333 (Ala. 1994), which involved another claimant who alleged the same misconduct as that alleged in this case, and who was represented by the same counsel as represents the plaintiff in this case, the jury awarded Ms. Foster $1 million in punitive damages; the jury in this case awarded the plaintiff $15 million. Such disparate awards give some credence to the claims frequently made by defendants that the system of awarding punitive damages in Alabama is much like a lottery.

It would have been helpful to me in reviewing excessiveness-of-the-verdict claim to have the decision of Supreme Court of the United States in BMW; that case contains some of the same or similar legal questions that are present here. Even without the benefit of that decision, I know that this Court has said that the award of punitive damages is a civil punishment and is for the purpose of

altering the behavior of wrongdoers. See, e.g., Pitt v. Century II, Inc., 631 So.2d 435 (Ala. 1993), Lozier Corp. v. Gray, 624 So.2d 1034 (Ala. 1993, Reserve Nat'l Ins. Co. v. Crowell, 614 So. 2d 1005 (Ala. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 84 (1993), General Motors Corp. v. Johnston, 592 So.2d 1054 (1992), and Maryland Casualty Co. v. Tiffin, 537 So.2d 469 (Ala. 1988). The Supreme Court of the United States has said that the awarding of punitive damages is a form of state regulation that can be as effective as statutory regulations, which are designed to protect consumers and the general public from similar wrongful actions. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

When businesses are involved in interstate commerce and punishment is rendered against them, additional questions are raised. During the oral arguments in BMW, one or more of the Justices asked whether "interstate commerce enter[ed]) the calculus" of determining whether a particular punishment was prohibited; however, the Court has not yet answered the question. The Supreme Court, in BMW, could very well hold as it held in Healy v. The Beer Institute, Inc., 491 U.S. 324, 336 (1989):

"[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' . . . [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."

Even though I have some reservations because I do not have the latest expression from the United States Supreme Court, I concur in the conditional affirmance based on the law that the Supreme Court has set out in several of its opinions, and without benefit of an opinion in the BMW appeal. In some respects this case is similar to TXO, but in another respect it is similar to BMW. Factually, it is most similar to Haslip, except that, in Haslip, as I recall, the plaintiff did not present as much evidence of a pattern and practice of misconduct as was presented here against this defendant.[15]

II.

I concur with the majority's decision to require a bifurcated proceeding in all cases, except wrongful death cases, where punitive damages are awarded; but, I would have preferred that the Court not adopt the procedure by caselaw. I would have followed our usual procedure of drafting a proposed rule, giving notice to the bench and bar and other interested citizens, and setting a time within which any person could file comments, pro or con, about the rule. The Court, by setting the effective date of the new procedure as three months after the certificate of

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[15]In the present case, evidence of four incidents, including that against the plaintiff, Ms. Johnson, which could constitute evidence of pattern and practice, was presented before the jury, before the trial court in the Hammond/Green Oil review, and before this Court. However, evidence of one of these incidents was presented by Mattie Foster, the plaintiff in Foster v. Life Insurance Co. of Georgia, 656 So.2d 333 (Ala. 1994). In that case, this Court reinstated a jury award for $1 million in punitive damages against Life of Georgia.

judgment issues in this case, does offer the bench and bar, and possibly the Legislature, a limited opportunity to address the new procedure; that opportunity is better than none. I do believe such a procedure will be beneficial to the jury and to courts that are called upon to review their findings. I have been concerned for some time about allowing juries to fix an amount of exemplary damages and giving them standardless discretion in doing so. In criminal cases, this State took the power to fix penalties from the jury several years ago and vested the power to sentence in the trial judges. Even in capital cases, the jury can only recommend a sentence to be imposed, after hearing evidence of aggravating and mitigating circumstances; the trial judge is not bound by that recommendation.

I make one further observation. The rule excepts wrongful death cases, where only punitive damages can be awarded. Personally, I believe that the Legislature should amend the wrongful death statute to provide for the recovery of compensatory damages, which other jurisdictions allow, but the Legislature, even when adopting the so-called "Tort Reform" package, did not address this issue.

III.

I now come to the portion of the opinion with which I must respectfully disagree. The majority quotes from a special concurrence in BMW, 646 So.2d at 629, and now holds that a plaintiff has no right to recover punitive damages. ___ So.2d at ___. While I agree, in principle, with the Court's holding that punitive damages, in a civil case, are for punishment and that it might be desirable that a portion of the award be paid into the State treasury, I do not believe that this Court has the power, or that it should assume the power, of determining that a portion of an award of punitive damages must be distributed to the State.

I believe that the power to collect revenue for the State treasury is a plenary power of the Legislature, and is beyond the powers of this Court.

At least three sections of Alabama's Constitution seem address this question. Section 42 provides:

> "The powers of the government of the state of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 43 provides:

> "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

Furthermore, § 70 provides, in part, that "[a]ll bills for raising revenue shall originate in the house of representatives." It is axiomatic that the judiciary declares what the law is, the Legislature what it shall be. Alabama Life Ins. & Trust Co. v. Boykin, 38 Ala. 510 (1863); Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 24 So. 171 (1898); Champion v. McLean, 266 Ala. 103,

95 So. 2d 82 (1957) (the power to make the law has been committed to the legislature by the Constitution, and the only power of the court is to declare the law as enacted by the legislative branch of government).

This Court has addressed the power of courts to deal with fines in Ellis v. State, 502 So. 2d 694 (Ala. 1986). Although I did not agree, this Court held that where a district judge, by court order, imposed a traffic fine of $50.00 over the normal fine because the defendant had a radar detector in the automobile, the judge was legislating, even though the fine was within the statutory limits of § 32-5A-8, in that the judicial action created an additional fine, which, under § 43 of the Constitution, could be enacted only by the Legislature.[16]

As I stated earlier, I personally would favor a procedure whereby a portion of punitive damages could be paid into the State treasury, because it would address the troublesome issue of single plaintiff receiving a "windfall" or winning a "lottery."

I would point out that only a few states have adopted a procedure for requiring the prevailing party in a civil case who recovers punitive damages to pay part of the award to the state general fund.[17] However, the Colorado statute has

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[16]In Ellis, I opined that a trial judge sentenced the defendant for speeding, not for possession of a radar detector.

[17]Although the majority opinion states that four states have adopted this practice, my research shows that nine states have adopted statutes requiring the payment of a portion of an award of punitive damages to the state government. The other states

[Footnote continued on next page]

been deemed unconstitutional by its Supreme Court,[18] Florida statute has been repealed by its legislature, and a federal district court declared Georgia's statute unconstitutional.[19] In addition, when Colorado and Florida had such laws in effect, they did not allow the attorney for the plaintiff to take a contingency percentage from the portion that was to be allocated to the state.[20]

I would also point out that some recent decisions of the United States Supreme Court suggest that if a state is the recipient of punitive damages awards, such awards may be

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[Footnote continued from previous page]

with similar punitive damages legislation are: Colorado (Colo. Rev. Stat. § 13-21-102(4) (1987)), Florida (Fla. Stat. § 768.73(2)(b) (1993 Supp.)), Georgia (Ga. Code Ann. § 51-12-5.1(e)(2) (1993)), Illinois (735 ILCS 5/2-1207), Iowa (Iowa Code § 668A.1(2) (1993)), Missouri (Mo. Rev. Stat. § 537.675(2) (1992 Supp.)), New York (N.Y. Civ. Prac. L. & R. § 8701 (McKinney 1993 Supp.)), Oregon (Or. Rev. Stat. § 18.540(1) (1991)) and Utah (Utah Code Ann. § 78-18-1(3) (1992)).

[18]See, Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991). The Colorado Supreme Court held in this opinion that the statute mandating that a portion of punitive damages awards be paid to the state, Colo.Rev.Stat. § 13-21-102(4), was unconstitutional as violating the Taking Clause of the Fifth Amendment of the United States Constitution.

[19]McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990).

[20]See, Schenck v. Minolta Systems, 873 P.2d 18 (Colo. App. 1993); Gordon v. State, 608 So. 2d 800 (Fla. 1992).

subject to judicial scrutiny under the Eighth Amendment's Excessive Fines Clause. The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis added.) Although the majority is correct in its assertion that in Browning-Ferris Industries v. Kelco Disposal Inc., 492 U.S. 257 (1989), the Supreme Court held that the Eighth Amendment did not apply to the award of punitive damages in a civil case between private parties, in my opinion this case suggests that the Excessive Fines Clause might apply to punitive damages awards where the state receives the proceeds of such awards. Specifically, the Court stated:

> "To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the confines of the Clause's reach may be, we now decide that only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history."

Browning-Ferris Industries, 492 U.S. at 263-64. (Emphasis added.)

As indicated by the Court in Browning-Ferris, the history behind the development and adoption of the Eighth

Amendment plays an important role in determining its applicability to awards of punitive damages in civil cases.[21] "The Eighth Amendment was based directly on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights." Browning-Ferris, 492 U.S. at 266. In 1689, Parliament required William of Orange to accept the provisions of the Bill of Rights as a condition precedent to offering him the throne. Section 10 of the English Bill of Rights had been adopted in order to curb the excess use of amercements, which had been generously levied by previous English monarchs. Amercements "were payments to the Crown, and were required of individuals who were 'in King's mercy,' because of some act offensive to the Crown." 492 U.S. at 269. History suggests that the use of these amercements was to impose penalties for both civil and criminal wrongs committed, and it seems clear to me that the Browning-Ferris case would have been decided differently had a portion of the civil fine in that case been paid to the government, because the civil fine then would have been similar, in nature, to "amercements," which were defined in Browning-Ferris as follows:

> "Amercements were an 'all-purpose' royal penalty; they were used not only against plaintiffs who failed to follow complex rules of pleadings and against defendants who today would be liable in tort, but also against

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[21] See, Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand.L.Rev. 1233 (1987); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va.L.Rev. 139 (1986), for a further discussion of the historical development of the Eighth Amendment.

> an entire township which failed to live up to its obligations, or against a sheriff who neglected his duties."

492 U.S. at 269.

History suggests that because of the numerous abuses that occurred from the use of amercements both the Magna Carta and the English Bill of Rights placed restraints on their imposition. Based on the historical development of the Eighth Amendment, the Supreme Court, in Browning-Ferris, ruled that the amendment's primary purpose was to curb governmental action, rather than to place restraints on the awards given in civil actions between private parties.[22] 492 U.S. at 268. In addressing "governmental" versus "private" action, the Court stated that "the text of the [Eighth] Amendment points to an intent to deal only with

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[22]The narrowness of the holding in Browning-Ferris seems apparent from a statement made by Justice O'Connor in her concurring/dissenting opinion in that case, where she cites a Florida statute (Fla. Stat. § 768.73(2)(b), which has since been repealed by the Florida Legislature, effective July 1, 1995), which mandated that 60% of any punitive damages awarded be allocated to the state. In reference to this statute, Justice O'Connor stated:

> "I also note that by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests that the Excessive Fines Clause will place some limitations on awards of punitive damages that are recovered by a governmental entity."

492 U.S. 298-99.

the prosecutorial powers of the government." Browning-Ferris, 492 U.S. at 275. (Emphasis added.) The Court held that the Excessive Fines Clause did not apply to the punitive damages award in the civil case before it, because the state had not "used its civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." 492 U.S. at 275 (Emphasis added.) The Court warned, however, that the Excessive Fines Clause might apply in cases where punitive damages were awarded and a state government either has "prosecuted the action" or "has any right to receive a share of the damages awarded." 492 U.S. at 264 (Emphasis added.) Consequently, there is little doubt in my mind that the decision the Court makes today means that future attacks on punitive damages awarded in this State in civil cases after the effective date of the opinion, will probably be subject to an analysis under the Excessive Fines Clause the Eighth Amendment. In summary, it appears to me that the decision in Browning-Ferris suggests that where a sovereign "has [a] right to receive a share of the damages awarded," even in a civil case, an Eighth Amendment analysis might be appropriate. 492 U.S. at 264. I am of this opinion because the Court observed, in holding that the Eighth Amendment was intended only to restrain governmental action, that at the time that the Eighth Amendment was adopted, the word "fine" was "understood to mean payment to the sovereign as punishment for some offense." Browning-Ferris, 492 U.S. at 265.

By analyzing the holding in Browning-Ferris, I do not mean to suggest that the Legislature of Alabama could not require the payment of a portion of punitive damages to the State General Fund, because I believe that it could; however, whether the fine is paid to the State by court order or by statute, I believe the amount of any fine in any

given case would be subject to an analysis under the Excessive Fines Clause of the Eighth Amendment.

Although the Double Jeopardy clause of the United States Constitution probably will not be held to apply to a purely civil case, that rule might change if a portion of a punitive damages award is paid to the state. Cf. United States v. Halper, 490 U.S. 435 (1989), where the Court held that the constitutional prohibition of double jeopardy required the reduction of a civil award rendered in favor of the United States against a defendant who had previously been subject to criminal sanctions for the same conduct. The Court in Halter discussed whether a civil award could be construed as placing a defendant in double jeopardy, and said:

> "[I]n determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated."

Halper, 490 U.S. at 447, n. 7. The Court announced that the purpose of the award is controlling under this analysis, rather than whether the action was pursued in a civil or in a criminal context:

> "In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and

> the criminal law, and for purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the action as applied in the individual case serves the goal of punishment."

490 U.S. at 448.

Some of the questions I raise about punishing a defendant more than once may be answered by the Supreme Court in BMW, which is now pending before it, but whether that Court answers these questions or not, it appears to me that punitive damages are penal in nature and that all the safeguards of both the Alabama and the United States Constitutions would apply. I do know that the Supreme Court of the United States has elected to grant certiorari review, and to write opinions, in at least three cases from this State in the past few years in which the question of excessive punitive damages awards were addressed. I would also point out that my suggestion of adopting a rule that would provide for the recovery of extracontractual damages, including attorney fees, would be preferable and fairer to the litigants, and would not result in the possibility that the attorney for the plaintiff might recover more than the plaintiff and the State, if 50% of the award (after expenses and attorney fees) went to the State, as the majority opinion allows. Another reason why I think

compensatory damages, including extracontractual damages, would be preferable to a rule that permits the recovery of punitive damages, is that such a rule eliminate problems about "windfalls" to one plaintiff, and would remove most of the legal problems that could develop when questions of double punishment arise.[23] I know further that in its most recent expression on punitive damages, that Court stated in Honda Motor Co., Ltd. v. Oberg, ___ U.S. ___, 114 S.Ct. 2331 (1994), the following:

> "Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express bias against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger."

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[23]In this case, the attorney for the plaintiff argued to the jury in the Foster case, and again to the jury in in this case, that Life of Georgia should be punished for selling these policies to elderly people. The question arises: How many times can a defendant be punished through exemplary damages? In BMW, the Justices, during oral arguments, made specific inquiry about the "multiplier" effect of permitting several plaintiffs to argue similar claims to separate juries. Cf., Dennis Neil Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala.L.Rev. 1 (1991).

Honda Motor Ltd., ___ U.S. at ___, 114 S.Ct. at 2340-41.

Summary

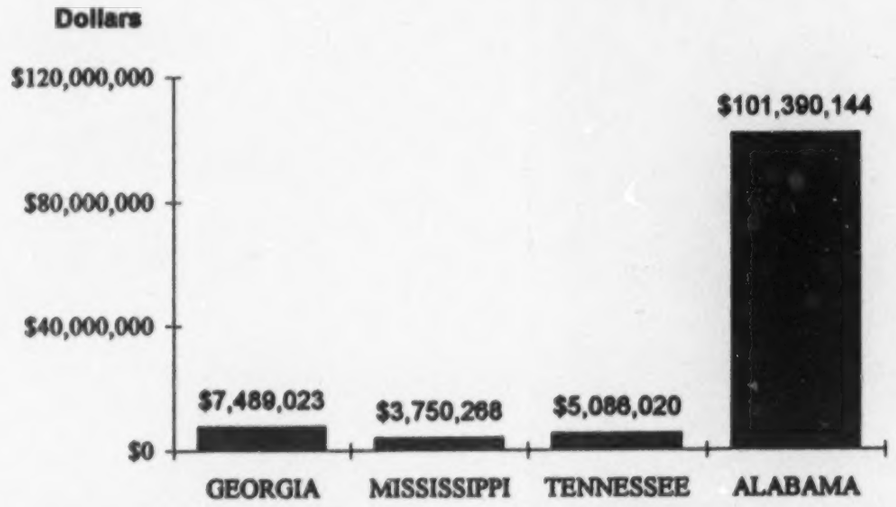
On several occasions I have suggested that the Legislature should consider adopting legislation that would protect both the consumer and the insurer in these noncommercial insurance cases. If the statistics appearing in Appendix A are correct, and I have no reason to doubt them, the State of Alabama seems to be out of line with neighboring States in regard to the amount of punitive damages awarded. It appears to me that the legislative branch is the proper forum for addressing any problem that does exist and for making the policy choices that must and should be made. This suggestion on my part is not new. I first suggested it in my dissenting opinion in the Kountz case, where I stated that "in our scheme of government, policy questions like [those presented in a bad-faith-failure-to-pay case], especially since they involve the heavily regulated insurance industry, should properly be addressed by the Legislature." 461 So.2d at 812. In that dissent, I also stated why I thought this Court should consider a rule allowing extra-contractual damages, suggesting that there very well might be instances when insurance companies pay claims that factually should have been denied, but the company opted to pay the claim rather than face the possibility of a lawsuit. I also suggested that if punitive damages awards in those instances do occur, then premiums for all other policyholders necessarily rise to offset these added costs. On the other hand, I also stated that the proliferation of lawsuits and the size of the jury verdicts suggested consumer dissatisfaction with some practices that were occurring. No doubt, there are instances when companies require policyholders to resort to a lawsuit, even though the insurer's factual basis denying a claim is questionable. I have previously stated that "[t]he fairest

rule, . . . in view of these two policy considerations, would be [a procedure] which would allow any party to a noncommercial insurance contract, who is forced to go to court in order to recover his contract claim, to recover his consequential damages as well, including reasonable attorneys' fees." Kountz, 461 So.2d at 813.

Although the imposition of punitive damages can punish and deter, it would appear to me that ideally the legislative branch should make the regulations, and that the executive branch should enforce them fairly, to effect the regulatory purpose of protecting the public welfare. See my opinion in Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1056 (Ala. 1987), where I specially concurred and suggested the Legislature should address the public policy concerns relating punitive damages.

PUNITIVE DAMAGE AWARDS AFFIRMED BY STATE COURTS

TOTAL AMOUNT
1987 - 1993



Source: Lexis, Westlaw, Southern Reporter 2d and Statistical Abstract of the United States 1993

Note: Awards affirmed by Georgia Apellate Courts, Alabama Supreme Court, Mississippi Supreme Court, Tennessee Appellate Courts. Population figures are as or 1990.

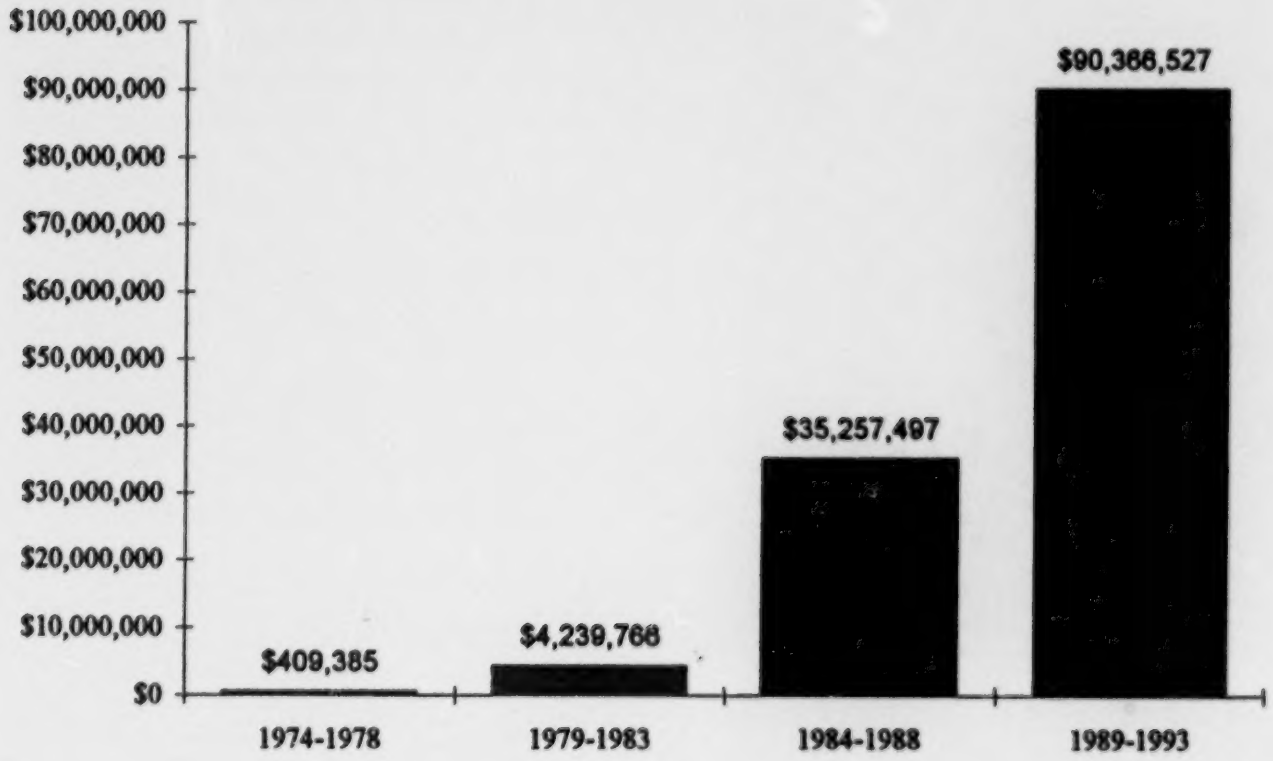
PUNITIVE DAMAGE AWARDS AFFIRMED BY STATE COURTS

PER CAPITA
1987 - 1993

Source: Lexis, Westlaw, Southern Reporter 2d and Statistical Abstract of the United States 1993

Note: Awards affirmed by Georgia Apellate Courts, Alabama Supreme Court, Mississippi Supreme Court, Tennessee Appellate Courts. Population figures are as or 1990.

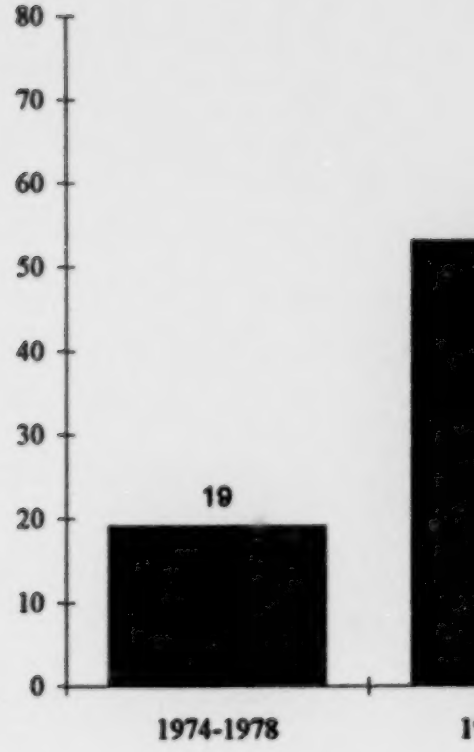
TOTAL AMOUNT OF PUNITIVE DAMAGE AWARDS AFFIRMED BY ALABAMA APPELLATE COURTS 1974 - 1993



Source: Lexis, Westlaw, Southern Reporter 2d

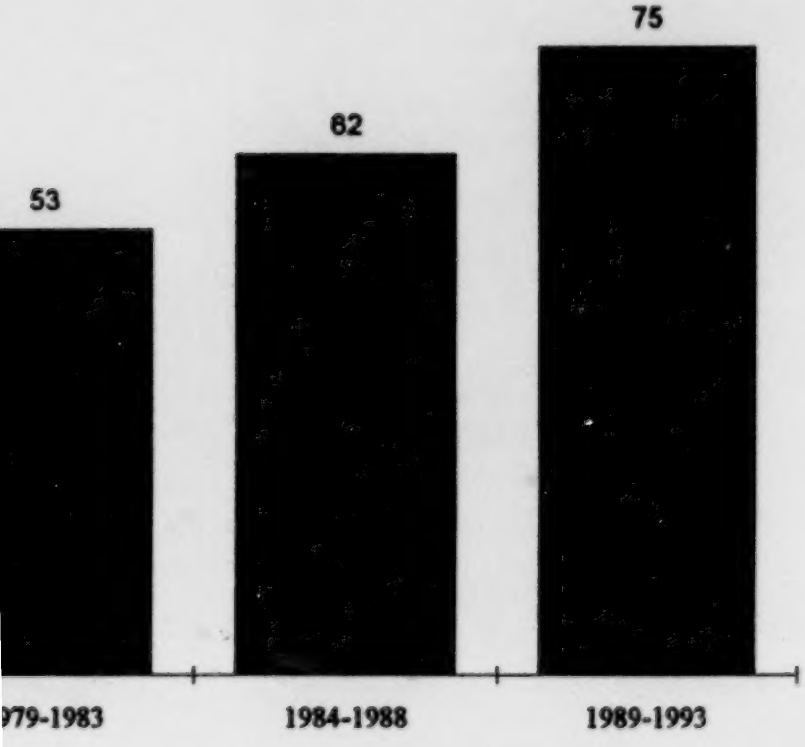
Note: Total does not include general awards that did not differentiate between compensatory and punitive damages

NUMBER OF
AFFIRMED BY

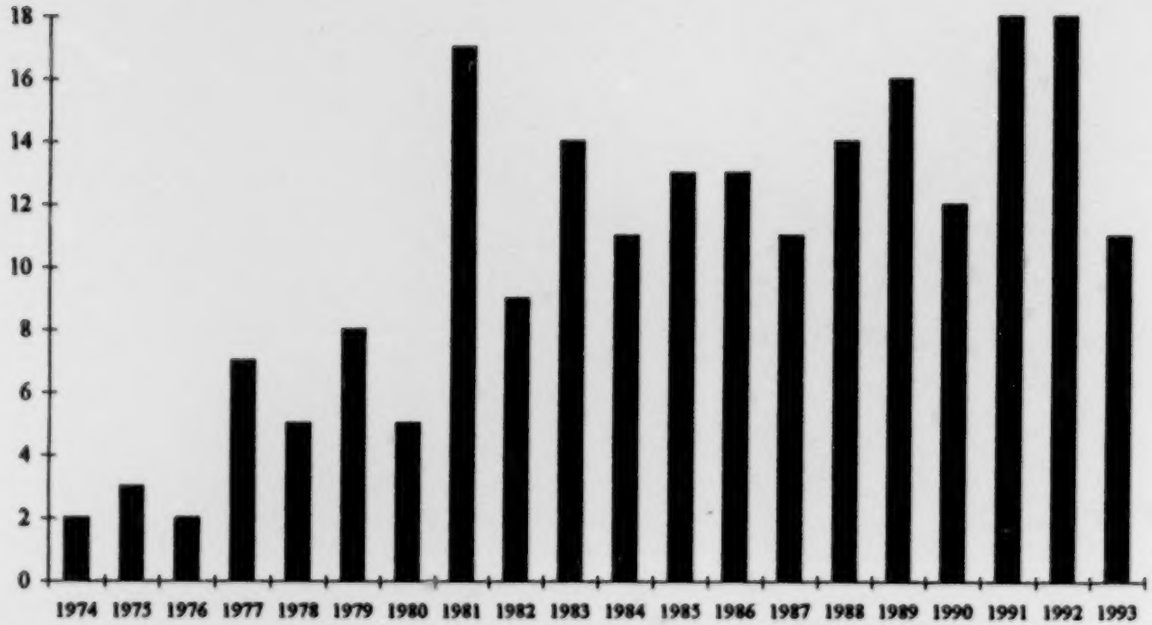


Source: Lexis, Westlaw, Southern Reporter 2d

PUNITIVE DAMAGE AWARDS
ALABAMA APPELLATE COURTS
1974 - 1993

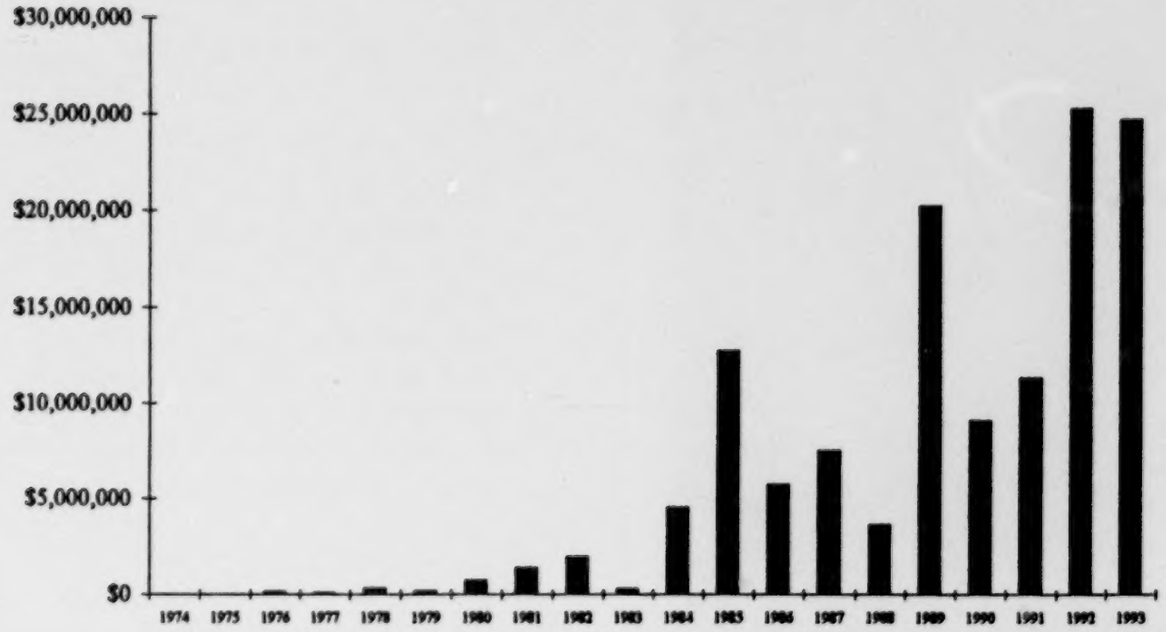


NUMBER OF PUNITIVE DAMAGE AWARDS AFFIRMED BY ALABAMA APPELLATE COURTS 1974 - 1993



Source: Lexis, Westlaw, Southern Reporter 2d

AMOUNT OF PUNITIVE DAMAGE AWARDS AFFIRMED BY ALABAMA APPELLATE COURTS 1974 - 1993



Source: Lexis, Westlaw, Southern Reporter 2d

Note: Total does not include general awards that did not differentiate between compensatory and punitive damages

Life Insurance Company of Georgia v. Johnson

BUTTS, JUSTICE (concurring in part and dissenting in part).

I.

I concur in the establishment of a bifurcated trial in cases where a plaintiff seeks punitive damages from a defendant. I believe such a procedural change is within this Court's authority, pursuant to Ala. Code. 1975, § 12-2-7. See Hammond v. City Gadsden, 493 So.2d 1374 (Ala. 1986); Green v. Hornsby, 539 So.2d 218 (Ala. 1989). However, I would add several caveats.

The majority's opinion states that in the punitive damages portion of the trial, the jury is to be informed of the factors set forth in Ala. Code 1975, § 6-11-23, Hammond, Green Oil, and other case law. ___ So.2d at ___. As a former circuit court judge, I believe that submitting facts and information from other cases, perhaps in an attempt by opposing attorneys to establish the amount of punitive damages awarded by other juries in "comparable cases," will be more confusing and time-consuming than it will be helpful.

Further, taking the Green Oil rule, the majority will have the jury informed of the plaintiff's costs of litigation, including attorney fees. I would either delete this requirement or require that the jury also be informed of the defendant's costs of litigation, including attorney fees.

II.

I respectfully dissent from the majority's holding requiring apportionment of a punitive damages award between the plaintiff and the State. It is for the legislature

to determine whether a portion of a punitive damages award should be paid to the State and, if so, what percentage of the award the State should receive, and it is for the legislature to determine the State fund or agency to which the monetary award should be allotted.

The majority would begin the process of allocating a portion of punitive damages to the State with this case, and would apply it to the punitive damages award in every case in which a verdict has been rendered but the judgment entered verdict is yet unpaid. Even if this Court has the authority to allocate punitive damages to the State, it should implement this change only in tandem with the procedure calling for a bifurcated trial. Therefore, I would not begin the process of allocating damages to the State in this case, or in any other case, where the award is not the product of a bifurcated trial.

III.

As the majority notes, lawsuits and jury awards of punitive damages have become virtually the only effective weapon people have to deter powerful entities from conducting tortious activities within this State. This condition has arisen because the State of Alabama lacks strong consumer protection laws and because the State agencies whose duty it is to enforce the existing body of laws are woefully underfunded. For example, Alabama's Insurance Department, with a scant budget of less than $2 million, a staff of fewer than 30 professional employees, including only 4 consumer protection specialists, is

responsible for regulating Alabama's $6 billion insurance industry, composed of 1100 companies.[24]

It is clear that Alabama needs stronger consumer protection laws and a realistic means to enforce them. The majority has now established that that portion of punitive damages allocated to the State will be paid into the General Fund. Common sense dictates, however, that the apportionment should be used to attack the underlying problem at its source. I believe that, if there is to be an apportionment to the State, it should be used to expand and strengthen the department or agency that polices the industry being punished. For example, in a case such as this, where an insurance company is found guilty of consumer fraud, the apportionment should be paid to the Alabama Department of Insurance. The punitive damages award would then become a meaningful investment in deterrence, rather than an unconditional gift to the State's General Fund.

WL961930.005/7+

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[24]Jerry Underwood, "Big Money Fight," Birmingham News, November 5, 1995, at 8A.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON	*	
Plaintiff,	*	
vs.	*	CASE NO. CV-93-969
LIFE INSURANCE COMPANY OF GEORGIA,	*	
Defendant.	*	

ORDER

This cause coming on to be heard before this Court on September 16, 1994, on Defendant Life Insurance Company of Georgia, Inc.'s motion for JNOV, new trial or remittitur and for a hearing pursuant to Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986); Green Oil Company v. Hornsby 539 So. 2d 218 (Ala. 1989); and Alabama Code §6-11-23 (b), based upon the award of punitive damages by the jury on June 2, 1994.

On June 2, 1994, the jury returned a verdict in favor of the Plaintiff and against Defendant Life Insurance Company of Georgia for $250,000.00 in compensatory damages and $15 million in punitive damages. On June 2, 1994, this Court entered a judgment on the verdict in this amount.

In rendering its findings, this Court considered the evidence admitted in the trial of this case as well as the briefs and voluminous additional evidence submitted by the parties at the hearing conducted on September 16, 1994.

Defendant also filed additional evidence after the hearing which the Court has considered.

Ample evidence was presented at trial which supports the total compensatory damage award of $250,000.00 against Life of Georgia. The issue to be determined is whether the punitive damage award of $15,000,000.00 is appropriate and justified by the evidence. Having considered the evidence presented at the trial of this case and at the hearings conducted by this Court, this Court finds that the award of punitive damages in the total amount of $15 million is excessive, and is of the opinion that a remittitur of $2,500,000 is appropriate for the reasons that follow. Plaintiff proved that Life of Georgia's agent, Barbara Holt, misrepresented to her that she needed health insurance under a Medicare supplement policy in order to pay her hospital and medical bills should she become sick. There was ample and substantial evidence that Plaintiff showed Barbara Holt her Medicaid card and that Barbara Holt knew or should have known that Plaintiff did not qualify for the insurance since she was a Medicaid recipient. Plaintiff proved that Barbara Holt was not properly trained to be aware of circumstances where elderly persons living on low fixed income such as Daisey Johnson have coverage under both Medicare and Medicaid. This lack of awareness permeated Life of Georgia's entire corporate structure as the vice president in charge of marketing and training, Robert Hayes, gave uncontradicted testimony that he too would "assume" that if someone was on Medicare they did not have Medicaid. Plaintiff proved that over 116,000 Alabamians have both Medicare and Medicaid. This lack of training and awareness fostered both intentional and reckless misconduct on behalf of its agents, including Barbara Holt. Plaintiff discovered, after hearing about a similar situation involving Mattie Foster and Life of Georgia, that she had been sold a Medicare supplement policy she did not need and was useless to her. Plaintiff's

proof that Life of Georgia was aware of the situation where unqualified elderly people living on fixed income were sold this Medicare supplement policy yet did nothing to prevent or detect such wrongful conduct distinguishes this case from "renegade agent" cases. Life of Georgia played an active role in allowing Barbara Holt to sell the policy in question and continue to collect the premiums.

Clear and convincing evidence was presented at trial that Life of Georgia was aware of the fraudulent sale of these Medicare supplement policies. Considering the degree of reprehensibility of Life of Georgia's conduct, this Court considered the duration of the conduct, the degree of the awareness of the hazard which the conduct caused or is likely to be caused in any concealment, cover-up or failure to remedy that hazard, and the existence and frequency of similar past conduct. Evidence was submitted at the trial that another lawsuit had been filed in Mobile County Circuit Court alleging activity almost identical to the case presented in the instant situation. Plaintiff further produced clear and convincing evidence through the testimony of three live pattern witnesses that Life of Georgia's conduct in selling these policies to elderly, uneducated, single black women was not an isolated event and had not ceased and these people were paying a very substantial portion of their fixed income for useless policies. Evidence was presented at trial that Life of Georgia was aware of the unfitness of its agent in selling this specialized type policy. Eric Peek testified that he trained Barbara Holt for Life of Georgia yet gave her no training relative to the Medicare Supplement policies because he himself did not receive training to enable him to understand and properly sell these policies. Evidence was presented at trial that Life of Georgia began marketing the Medicare supplement policies in 1986 and that continuing through the date of the verdict in June of 1994 Life of Georgia had done nothing to ferret out and correct the problem. In fact, Life of Georgia's corporate

officers testified during the Plaintiff's presentation of her case that Life of Georgia had done nothing to try to prevent the sale of Medicare supplement policies to unqualified persons even though in 1992 Life of Georgia had been faced with trial in Mobile County and experienced an adverse verdict. The Court can only conclude from Life of Georgia's failure to produce any rebuttal testimony as to Life of Georgia's failure to remedy this problem once it became known (approximately three years before trial) that Life of Georgia's conduct is egregious and callous disregard for the rights of Alabama adjusters. Further, the Court considers the status of the Plaintiff and those situated similarly to her in making this ruling.

Daisey Johnson is 82 years old, went through the third grade in school and spent her working life ironing, cleaning and "working for white folks". She is a trusting individual who was polite to all persons involved, a proud woman who displayed an immense trust in those people around her. The pattern witnesses who testified were very similarly situated to Ms. Johnson. It is this type of people, namely elderly, uneducated and living alone that are easy prey to unscrupulous companies.

Thus, the duration of Life of Georgia's wrongful conduct has been the entire time they have been aware of this problem, namely the filing of the Mattie Foster lawsuit in 1991; the degree of Life of Georgia's awareness of the this problem is high since they have been required to hire lawyers to defend themselves for this conduct since 1991; and, the concealment or cover-up of the hazard consisted of Life of Georgia continuing to collect premiums and service Medicare supplement policies which were sold to persons such as Plaintiff who did not qualify for the insurance and the fact that its ex-agent and manager was told to "do nothing" by his superiors when he questioned them about

Medicaid recipients having Life of Georgia Medicare policies.

Plaintiff thought she was buying a security blanket to protect her if she became sick. Plaintiff considered dropping the policy because of its high cost, namely approximately one-third of her income. Life of Georgia told Plaintiff, however, that if she dropped the coverage she could lose her house and showed her an article from the Mobile Press Register where people from Baldwin County had lost their home to a hospital in a judgment. Further, the testimony referred to above of Life of Georgia's district supervisor went uncontradicted by Life of Georgia. In defrauding Daisey Johnson, Life of Georgia was merely acting in accordance with the testimony that the agents were trained to sell policies and collect premiums as opposed to looking out for the best interest of the customers. This conduct was demonstrated at trial to last over a period of years.

There was ample evidence that Life of Georgia agents were required to sell a large amount of insurance or lose their jobs. In fact, of the approximately ten field agents who testified, all but one or two had left the company for failure to comply with the minimum sales requirement. The jury justifiably could have believed that Life of Georgia's desire to generate premiums as opposed to looking out for the customer's needs and concerns played a key role in not preventing this type of conduct from continuing. Life of Georgia made a conscious decision to continue servicing Medicare supplement policies with the knowledge that there was a very real threat and likelihood that persons such as Daisey Johnson were paying premium dollars unnecessarily for coverage she did not need.

This Court is mindful that this verdict is large. Yet this Court finds that a punitive damage award of $12,500,000 bears a reasonable relationship to the harm that is likely to

occur from Life of Georgia's conduct as well as to the harm that actually has occurred. The harm which was committed is even more egregious because Life of Georgia refuses to admit or concede any wrongdoing whatsoever and merely contributes the sale of this policy as a "miscommunication". Life of Georgia has profited from such "miscommunications."

The Court finds that the economic impact of the verdict on Defendant Life of Georgia is slight. In 1993, the company had assets exceeding $2.3 billion. Investment income alone totaled $173 million for 1993 and the company has over $1.1 billion in reserve. The company has testified that it has sufficient resources to pay the judgment if it should be affirmed. The financial position of Life of Georgia does not support any reduction in this verdict.

The Court finds that the verdict should be high in order to encourage a plaintiff such as this, and her attorneys, to pursue this type of case. The Court is of the opinion that there are many people situated such as Plaintiff who are unable due to sickness, age, infirmity or whatever to pursue such a case. The Court has considered whether the cost of this litigation favors remittitur and is of the opinion that this factor does not weigh in favor of reducing this verdict.

The Court has compared this verdict to other verdicts affirmed by the Alabama Supreme Court, including Northwestern Mutual Life Insurance Company v. Sheridan. The Court is mindful that the $15 million punitive award is $2,500,000.00 larger than that amount affirmed in Sheridan, which is the largest punitive damage award in fraud case ever affirmed by our Supreme Court. The Court has compared the facts of the Sheridan case, as set forth in the Supreme Court's opinion, and the facts of this case. The Court is clearly convinced that the wrongful conduct in this case is much worse. The class of plaintiffs Life of

Georgia preyed upon were from a group of citizens that need the most protection, elderly, uneducated, and low income. Life of Georgia knew that these type of individuals were easily persuaded, and used sales techniques such as "fear" to sell these policies. The Court further compared this verdict to other verdicts similar in nature. Nevertheless, although this Court is of the opinion that the facts in this case are much worse than those in the Sheridan case, the Court is of the opinion that the punitive award in this case should be reduced by $2.5 million so as to not exceed the largest punitive award affirmed by our Supreme Court.

Next, the president of Life of Georgia testified that Life of Georgia ceased doing business in Alabama and would never return. He also testified that if any policyholder of Life of Georgia had been sold a Medicare supplement policy who had received Medicaid benefits, that person's premiums would be immediately refunded. He further stated that Life of Georgia had undertaken a program in Alabama to determine whether there were any policyholders situated such as Daisey Johnson. However, the Court is aware that following the testimony of Life of Georgia's president, a witness testified by deposition for Plaintiff that her 91-year-old father was on Medicaid, had been sold a Medicare supplement policy and that she had demanded Life of Georgia to return his premiums. Ms. Pernell, the daughter of the person sold the Medicare supplement policy, was informed by Life of Georgia that they would not refund the premiums. This testimony contradicts that of the president and concerns the Court as to the quality of Life of Georgia's assertion that it would refund premiums once an unqualified policyholder came forward.

It is the conclusion of this Court that the verdict was not based upon bias, passion, prejudice, corruption, or other

improper motive, but instead was the product of the jury's careful and studious consideration of the evidence and applicable law. This conclusion is based in part on this Court's observing all of the parties to the trial, the respective attorneys, and the jury and its reaction to all of the others. The jury was justified in awarding these damages to punish Life of Georgia and to prevent similar wrongs in the future. The imposition of these damages in this case creates a strong incentive for vigilance on the part of all insurance companies doing business in this state. The jury arrived at an amount that it considered necessary to vindicate the public interest by eliminating the reprehensible conduct of this Defendant and in punishing it appropriately. This verdict is not so large that it goes beyond an amount necessary to accomplish these goals. This verdict will have little, if any, impact upon Life of Georgia and other insurance companies unless it is substantial.

Based upon all of the evidence introduced, but mindful of the purpose of punitive damages, the Court is of the opinion that the Defendant's Motion for New Trial be granted, unless the Plaintiff files a Remittitur within thirty (30) days of the date of this order on the punitive damage award in the amount of $2,500,000, leaving a punitive damage award of $12,500,000. Defendant's Motions for JNOV and Motion for Remittitur as to the compensatory award are hereby **DENIED.**

DONE this 19th day of October, 1994.

/s/ Braxton L. Kittrell
BRAXTON L. KITTRELL, JUDGE

WL961970.001/11

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON	*	
Plaintiff,	*	
vs.	*	CASE NO. CV-93-969
LIFE INSURANCE COMPANY OF GEORGIA,	*	
Defendant.	*	

DEFENDANT LIFE INSURANCE COMPANY OF GEORGIA ANSWER TO PLAINTIFF'S COMPLAINT

Comes now defendant Life Insurance Company of Georgia and for Answer to plaintiff's Complaint as follows:

* * * *

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has asserted tort claims which allow for the imposition of punitive damages in certain cases. The imposition of punitive damages in this case would violate the Due Process Clause of Amendment V and XIV to the United States Constitution and Article I, Section 6 of the Alabama Constitution of 1901 because the imposition of punitive damages would violate this defendant's right to substantive due process and procedural due process.

SIXTH AFFIRMATIVE DEFENSE

The plaintiff seeks punitive damages in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, jointly and separately, of the Constitution of the United States in each of the following separate and several ways:

(a) Joint and several judgments may be awarded against multiple defendants for different alleged acts of wrongdoing.

(b) There are no means provided for awarding separate judgments against alleged joint tort-feasors.

(c) There is no limit placed on the amount of the award against these defendants.

(d) There are no provisions for clear and consistent appellate standards of review of any award of punitive damages against these defendants.

(e) The standards of conduct upon which punitive damages are sought against these defendants are vague and ambiguous.

(f) The procedures to be followed fail to provide a meaningful opportunity for challenging the exces-siveness of such awards.

g) Alabama law permits the imposition of punitive damages which are vastly disproportionate to any actual or compensatory injury, thus violating the 14th Amendment of the U.S. Constitution.

h) The award of punitive damages would constitute an arbitrary and capricious taking of the property of this defendant which is unjustified by any rational governmental interest, thus violating the 14th Amendment of the U.S. Constitution.

i) The purpose of punitive damages under Alabama law is to punish certain conduct and is penal in nature. Such punishment amounts to criminal punishment under a standard of proof "clear and convincing" less than the criminal standard of "beyond a reasonable doubt." Thus, this defendant is subjected to criminal punishment under a lesser standard than that required for criminal defendants, thereby, violating this defendants rights.

* * * *

THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON	*	
Plaintiff,	*	
vs.	*	CASE NO. CV-93-969
LIFE INSURANCE COMPANY OF GEORGIA,	*	
Defendant.	*	

BRIEF IN SUPPORT OF DEFENDANT LIFE INSURANCE COMPANY OF GEORGIA'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR JNOV, OR IN THE ALTERNATIVE, FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia"), submits this brief in support of its Motion for New Trial, or in the Alternative, for JNOV, or in the Alternative, for Remittitur and says as follows[1]:

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[1] Life of Georgia has raised other issues in its post-trial motion. This brief does not address each individual issue raised in the post-trial motion. Nevertheless, Life of Georgia does not waive nor should it be construed that Life of Georgia intends to waive any issue contained in the post-trial motion by the filing of this brief. For the record, Life of Georgia expressly adopts and incorporates each and every issue contained in its post-trial motion as if contained herein.

INTRODUCTION

Life of Georgia files this brief to address certain fundamental defects in the trial of this case that render the $15,000,000 punitive damage award imposed against Life of Georgia invalid as a matter of Alabama law and the United States Constitution.

* * * *

D. THE ALABAMA PUNITIVE DAMAGE SYSTEM, ON ITS FACE, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

1. Post-Haslip Events Demonstrate That The Alabama System Violates Due Process

The United States Supreme Court in Honda observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." 114 S. Ct. at 2430. To protect against this danger, the Honda Court "strongly emphasized the importance of the procedural component of the Due Process Clause [of the Fourteenth Amendment]" in punitive damage cases. Id. at 2335.

The Alabama punitive damage system, however, does not include sufficient procedural protections to comport with the Due Process Clause. While the Supreme Court perceived the system as constitutional in Pacific Mutual Life Ins. v. Haslip, 499 U.S. 1 (1991), events subsequent to Haslip, including the verdict in this case, have shown that the system is wholly arbitrary, fundamentally unfair and utterly irrational in violation of federal due process. See Armstrong v. Roger's Outdoor Sports, Inc., 581 So.2d 414, 423 (Ala. 1991) (Maddox, J., dissenting); Henderson v. Alabama Power Co., 627 So.2d 878, 894-95 (Ala. 1993) (Maddox, J., dissenting); id. at 914 (Houston, J., dissenting)

Indeed, last year in Henderson the Alabama Supreme Court declared that the legislative limit of $250,000 on most punitive damage awards, Ala. Code § 6-12-21, violated the state constitutional right to a jury trial. The court made clear that the imposition of punitive damages in Alabama is an utterly ad hoc "exercise [in] direct democracy" by the jury and review on "a case by case basis" by the courts that cannot be constrained by any objective legislative limits. Id. at 893. Thus, while "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy," Gore v. United States, 357 U.S. 386, 393 (1958), the Alabama Supreme Court has affirmatively banned the State's legislature from playing any role in controlling punishment meted out in the form of punitive damages.

In his dissenting opinion in Henderson, Justice Maddox expressed the view that "[i]n striking down the cap statute," the Alabama Supreme Court had "remove[d] one of the underpinnings that I believe caused the United States Supreme Court to approve Alabama's procedures for reviewing punitive damage awards in [Haslip]." 627 So. 2d at 894-95; see id. at 898 n. 10, 900-01. Moreover, only four days after Haslip was decided, the Alabama Supreme Court struck down on state constitutional grounds, a statute that would have required that the Alabama courts engage in precisely the kind of independent judicial review of punitive damage jury verdicts that the United States Supreme Court seemed to think in Haslip was required by Alabama law, leading Justice Maddox to conclude that Haslip was predicated on a "mistaken" understanding of the way in which the Alabama punitive damage system actually functions. See Armstrong, 581 So. 2d at 423 (Maddox, J., dissenting).

In fact, the Alabama Supreme Court's decisions invalidating legislative attempts to reform the State's

punitive damage system directly undermine central reasoning of not only the majority opinion in Haslip, but also that of Justice Scalia's concurring opinion, which rested, in part, on the assumption that Alabama and other "[s]tate legislatures . . . have the power to restrict or abolish . . . punitive damages." Haslip, 499 U.S. at 39 (Scalia, J., concurring).[3]

The consequences of the Alabama Supreme Court's elimination of the statutory cap and other legislative reforms have been devastating, producing an explosion in the size and frequency of punitive damage verdicts. Just since January 1, 1994, Alabama juries have returned punitive damage verdicts totaling over $180,000,000. See Appendix A, attached hereto. From January 1, 1994 to August 1, 1994, the Alabama Supreme Court sustained a total of $7,790,000 in punitive damages, and its combined total of affirmed punitive damage awards for the years 1992

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[3] In arguing before the United States Supreme Court in Haslip that the Alabama system comported with due process, counsel for respondents placed particular emphasis on the authority of the legislature to intervene and address any perceived unfairness to defendants resulting from the Alabama system:

"MR. ENNIS: . . .

This Court should not expand upon that traditional understanding of due process and throw settled State tort law into complete disarray . . . without compelling reason to believe that the legislative process is closed or is incapable of addressing that problem."

Henderson, 627 So.2d at 900-01 n. 14 (Maddox, J., concurring and dissenting) (emphasis by Justice Maddox) (quoting transcript of oral argument in Haslip).

and 1993 was nearly $50,000,000. See Appendix B, attached hereto.

Standing alone, these remarkable figures demonstrate that punitive damages in Alabama are, literally, "'run[ning] wild.'" Haslip, 499 U.S. at 18. But the extraordinary profligacy of the Alabama system is further exposed when it is compared to the systems of the neighboring jurisdictions of Mississippi, Tennessee, and Georgia.

From January 1, 1987 to August 1, 1994, the Alabama Supreme Court sustained $109,180,144 in punitive damages. See Appendix B, attached hereto. In dramatic contrast, the Mississippi Supreme Court upheld only $3,820,267 in punitive damages. See Appendix C, attached hereto. During the same period, the Tennessee appellate courts affirmed punitive damages totaling $5,386,020.17, see Appendix D, attached hereto, and Georgia appellate courts affirmed $7,914,023 in punitive damages. See Appendix E, attached hereto.

In other words, the Alabama Supreme Court's output of punitive damages in the first seven months of this year ($7.79 million) exceeds that of Mississippi and Tennessee appellate tribunals -- and falls just short of the Georgia total -- for the last seven years. And, over the same seven year period, the Alabama Supreme Court affirmed 28 times more in punitive damages than the Mississippi Supreme Court, 20 times the amount affirmed by the Tennessee appellate courts, and 13 times the amount affirmed in Georgia.[4]

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[4] During the 1994 Spring Meeting of the Alabama Defense Lawyers in San Destin, Florida, Chief Justice Hornsby advised the ADLA members attending that, if Alabama's

[Footnote continued on next page]

Based upon these figures and other studies, Life of Georgia's expert witness Professor George Priest of Yale Law School testified:

> There is something crazy happening. Alabama is grossly -- even to use the metaphor in line or out of line doesn't capture it. There is something really -- I think it is unparalleled in the history of American jurisprudence to have this number and magnitude of punitive damages judgments over this period of time. I've never seen anything like it. I don't think anybody has ever seen anything like it in any history of punitive damages in modern days.

Deposition of George Priest ("Priest Dep."), at 39.

These comparisons confirm the utterly arbitrary, and flatly unconstitutional, nature of Alabama's punitive damage system. Alabama affords juries standardless discretion to impose unlimited punishment in the absence of legislative limits,[5] and Alabama post-verdict review completely fails to cure this crucial constitutional defect. As Justice Maddox has observed, "the Supreme Court of

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[Footnote continued from previous page]

system of awarding punitive damages was out of line with Alabama's sister states, the Alabama courts should correct the problem.

[5] The standards of liability for imposing punitive damages applied here by the Jury to hold Life of Georgia liable for alleged agent fraud are so vague and subjective as to be unteiligible and violate federal due process.

the United States was mistaken" when it found the Alabama system to provide "'meaningful and adequate'" protection against arbitrary punitive damage awards. Armstrong, 581 So. 2d at 423 (Maddox, J., dissenting).

2. Federal Due Process Principles Require That The $250,000 Legislative Limit On Punitive Damages Be Reinstated And Applied To This Case

In Honda the Court stated that the "Haslip opinion[ ] establish[es] that states cannot abolish limits on the award of punitive damages." 114 S. Ct. at n. 9. That is, however, exactly what the Alabama Supreme Court did when it struck down the $250,000 legislative cap on punitive damages in Henderson. But the Honda federal due process requirements, coupled with the mandates of the Federal Supremacy Clause, override the Alabama Supreme Court's decision in Henderson and require that the $250,000 cap be reinstated and applied to this case.

Henderson "abolish[ed] [a] limit[ ]" on punitive damages that is absolutely crucial to the Alabama system's constitutional validity. As the United States Supreme Court recently recognized, "[t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994). The Supreme Court also has observed, in the context of criminal proceedings, that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." United States v. Batchelder, 442 U.S. 114, 123 (1979). In the criminal justice system, due process therefore requires that the "range of penalties" be established in advance so as to "inform[ ] . . . the courts, prosecutors, and defendants of

the permissible punishment alternatives available . . . ." Id., at 126. Indeed, it is a basic principle of our criminal law that the government can prosecute a person only under a criminal statute that "fairly and clearly define[s] the conduct made criminal and the punishment which can be administered." Berra v. United States, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting).[6]

The events in Alabama since Haslip demonstrate that the same due process rule must apply to punitive damage cases. There can be no doubt that "[t]he extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." Landgraf, 114 S. Ct. at 1507. As the deluge of recent verdicts illustrates, Henderson's abolishment of the $250,000 maximum limit on punitive damages eradicated the only meaningful limit that existed in Alabama on the "extent" of a defendant's potential liability for punitive damages.

Moreover, when the conduct at issue in this case occurred in 1990, the $250,000 limit remained intact and stated the maximum punishment that could be imposed against Life of Georgia. To apply the Henderson decision retroactively to this case would subject Life of Georgia to

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[6] The due process requirement that a "person of ordinary intelligence" have fair notice as to what the law commands or forbids is equally applicable in civil proceedings. A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925) ("It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.") See generally Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

an additional punishment of $14,750,000 above and beyond what it had notice could be imposed when the Medicare Supplement policy was sold to Mrs. Johnson. The Supreme Court, however, has explicitly recognized that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." Landgraf, 114 S. Ct. at 1505. Application of Henderson here would result in a massive, and patently unconstitutional, retroactive punishment against Life of Georgia in this case.[7]

E. THE $15,000,000 PUNITIVE DAMAGE VERDICT IS SO ARBITRARY, CAPRICIOUS, GROSSLY EXCESSIVE, AND IRRATIONAL THAT IT CONTRAVENES ALABAMA LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

As the evidence Life of Georgia will submit in connection with the Hammond/Green Oil hearing demonstrates, the $15,000,000 punitive damage verdict in this case is, by any measure, grossly excessive, arbitrary, capricious and irrational, and therefore invalid under both Alabama law and the federal Due Process Clause. See

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[7] The Supreme Court has suggested that a state punitive damage system that discriminated against out-of-state companies might violate the Due Process Clause as well as other federal constitutional provisions. TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2720 & n. 23 (1993); Honda, 114 S. Ct. at 2430-41. To the extent that such discrimination against Life of Georgia, it would violate due process, as well as the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.

Hammond, 493 So.2d at 379; Green Oil, 539 So.2d at 223-24; Honda, 114 S. Ct. at 2335 ("the Constitution imposes a substantive limit on the size of punitive damages").

First, the $15,000,000 fine bears no relationship whatever to the actual or potential harm to plaintiff. The total out-of-pocket loss to plaintiff -- the amount of premiums that she actually paid -- is $3,132. See Exh. A to Deposition of James Barth ("Barth Dep."). The punitive damage award is approximately 5000 times that amount. And it is 60 times the compensatory damages for "emotional distress," which also are grossly excessive and have no support in the record at all.[8]

Second, the punitive damage award bears no rational relationship to the conduct of Life of Georgia in this case. There is no dispute that it is against Life of Georgia's company policy to sell Medicare Supplement policies to persons who are on Medicaid. Moreover, the evidence at trial, at best, shows that there was a miscommunication between plaintiff and the Life of Georgia agent who sold

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[8] The jury's verdict explicitly labeled $15,000,000 of the damages "punitive," but also awarded $250,000 in damages purportedly to compensate Mrs. Johnson for her alleged emotional distress. But this latter award is so far in excess of plaintiff's alleged actual injuries that it amounts to punishment as well, see, e.g., United States v. Halper, 490 U.S. 435, 447-52 (1989) (amount of civil penalty was "so disproportionate to the damages caused that it constitutes . . . punishment" for purposes of the Double Jeopardy Clause), and must be judged by the same constitutional principles that govern the explicitly punitive awards and factored into the equation when determining what amount, if any, of punitive damages is necessary to achieve deterrence in this case. See Exh. M to Barth Dep.

the policy concerning plaintiff's Medicaid eligibility, and, immediately upon learning of plaintiff's eligibility for Medicaid, Life of Georgia attempted to contact plaintiff and resolve the issues concerning plaintiff's Medicare supplement policy. However, plaintiff refused to respond and give Life of Georgia an opportunity to cancel the policy and refund the premiums paid by plaintiff or take other appropriate action. Instead, plaintiff filed this action regardless of the fact that Life of Georgia had even paid benefits to Mrs. Johnson pursuant to the Medicare Supplement policy's terms.

Third, the punitive damage award is utterly arbitrary when compared to Life of Georgia's profit or potential profit from the transaction. As discussed above, the cross revenue produced for Life of Georgia by the transaction was the amount of premiums paid -- $3,132. To inflict a punishment that exceeds that amount by 5,000 times is absurd and unconstitutional. As the deposition testimony of Life of Georgia's expert witnesses shows, Medicare Supplement policies have a very "thin margin" of profitability and their sale has ordinarily generated very low, if any, profit for Life of Georgia in Alabama. See Barth Dep.; see also Priest Dep.

There was, in fact, no possible profit motive for Life of Georgia's conduct in this case. At the time the Medicare Supplement policy was sold to Mrs. Johnson, Life of Georgia had in place its current rescission procedure, which it followed whenever it discovered that a Medicare Supplement policyholder was eligible for Medicaid as of the date of application for the Medicare Supplement policy. That procedure requires Life of Georgia to cancel the Medicare Supplement policy and refund all premiums, less claims paid to the policyholder, and to deduct all supplement-policy commissions from the salary of the agent who sold the policy. See Exh. H to Barth Dep. Given this

procedure, which eliminates all possible profit (and more, when transaction costs are considered) connected with the transaction, it would have made no sense for Life of Georgia to intentionally seek to sell Mrs. Johnson a Medicare Supplement policy if it knew she did not need one.

Life of Georgia also has already expended $1,186,119 as a result of litigation arising out of the sale of its Medicare Supplement policies, Exh. I to Barth Dep., and that is more than enough to remove its profit and achieve the goal of encouraging it and other insurers to take extra precautions to ensure that policyholders clearly understand the nature of the policies they are purchasing. No legitimate governmental purpose is served by exacting an additional $15,000,000 penalty against Life of Georgia, an amount that would take Life of Georgia 300 years to recoup based on its 1993 Medicare Supplement premiums in Alabama. Exh. N to Barth Dep.

Fourth, the $15,000,000 punitive damage award is grossly disproportionate to the legislatively established fines for conduct analogous to that alleged here. Indeed, the maximum fine for making a "false or fraudulent statement or representation . . . relative to an application for insurance" Ala. Code § 27-12-23, is only $1,000. See Ala. Code § 27-1-12; see also Ala. Code § 27-12-17 (maximum fine of $1,000 for collecting a premium for insurance which is not provided to the insured). And the maximum fine for any felony in Alabama is $20,000, or "[a]n amount not exceeding double the pecuniary gain to defendant or loss to the victim caused by the commission of the offense." Ala. Code § 13A-5-11.

Finally, the imposition of such a large punishment for conduct like that involved here has a devastating impact on third parties -- namely, the citizens of Alabama. Because of the erratic and unfair manner in which the Alabama

system imposes punitive damages against insurance companies, Life of Georgia has determined to stop writing new policies in this State, and other companies have, or are likely, to take similar action. As James Dill, Alabama's Commissioner of Insurance, stated in response to Life of Georgia's decision to discontinue insurance sales in the State: "This is not the first company nor will it be the last company to pull out of Alabama due to the litigious nature in our state. Insurance companies threatening to pull out of the State of Alabama due to excessive punitive damages is no longer an idle threat." June 23, 1994 Press Release of Commissioner Dill, at 3.

Additionally, Commissioner Dill "stated it was also a concern to the Department and should be to all Alabamians that an insurance company . . . [the size of Life of Georgia] would be withdrawing from Alabama. Not only does this make less options available to consumers regarding life and health insurance products; it causes people to lose jobs and it also generates less premium tax for the State's general fund." Id.

The deposition testimony of Life of Georgia's expert witnesses likewise demonstrates that the arbitrary, yet frequent, infliction of massive punitive damage awards will drive socially useful products off the market. Products like the insurance policy at issue here, which have very low profit margins, are especially likely to be withdrawn from the market if their sale can result in such disproportionate punishments. See Priest Dep.; Barth Dep.

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IN THE SUPREME COURT OF ALABAMA

LIFE INSURANCE COMPANY OF GEORGIA,	)	
Appellant,	)	
vs.	)	Supreme Court No. 1940357
DAISEY L. JOHNSON,	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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* * * *

III. THE $12,500,000 PUNITIVE DAMAGE AWARD IS SO GROSSLY EXCESSIVE AND FUNDAMENTALLY UNFAIR THAT IT CONTRAVENES ALABAMA LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Even were Life of Georgia not entitled to J.N.O.V. or a new trial, this Court would be required at a minimum to order a substantially larger remittitur of the punitive damage award than that ordered by the Trial Court. The $12,500,000 punitive damage award is, by any measure, grossly excessive and fundamentally unfair. It is therefore invalid under both Alabama law and the federal Due Process Clause. *See Hammond,* 493 So. 2d at 1379; *Green Oil,* 539 So. 2d at 223-24; *Honda,* 114 S. Ct. at 2335 ("the Constitution imposes a substantive limit on the size of punitive damage[s]").

A. The Punishment Is Based On Improper Calculations And Grossly Excessive

The $12,500,000 punitive damage award should be substantially reduced based upon several factors articulated by this Court for review of such awards.

First, the award bears no rational relationship to the conduct of Life of Georgia. As discussed above, the evidence in this case does not constitute clear and convincing proof that Life of Georgia engaged in conscious or deliberate misconduct. *See supra* pp. 17-27. But even were there a sufficient evidentiary basis to award punitive damages, the evidence bearing upon the Life of Georgia's conduct -- *e.g.*, the undisputed testimony that the Company prohibited its agents from selling Medicare Supplement policies to persons eligible for Medicaid, the policy

application that specifically asked the applicant whether he or she was covered by Medicaid, Ms. Holt's testimony *and* Ms. Johnson's testimony on direct examination that Ms. Johnson answered "no" when asked whether she was covered by Medicaid -- simply does not support a punitive damage award of such a magnitude as that upheld by the Trial Court below.

Second, the $12,500,000 fine bears no relationship whatsoever to the actual harm to Plaintiff or any conceivable harm from Life of Georgia's conduct. The total out-of-pocket loss to plaintiff -- the amount of premiums that she actually paid -- is $3,132. *See* R 247. The $12,500,000 punitive damage award is approximately **3991** times that amount. And it is 50 times the compensatory damages for "emotional distress," which also are grossly excessive and have no support in the record at all.

Third, the $12,500,000 punitive damage award is completely out of line with the amount of punitive damages upheld in comparable cases. Even with the remittitur granted below, the punitive damage award still vastly exceeds the amount of punitive damages awarded in virtually all fraud cases. It is **6.25** times the size of the remitted punitive damage award for automobile sales fraud in the *BMW* case, which award the Supreme Court of the United States is now reviewing for excessiveness in violation of the Due Process Clause of the Fourteenth Amendment. And it is **12.5** times greater than the punitive damage award upheld by this Court in *Foster* v. *Life Insurance Co. of Georgia,* Nos. 1994 Ala. Lexis 17, at *l-

*2 (Ala. Jan. 14, 1994), which involved a nearly identical fact situation to this case.[14]

Fourth, punitive damages were awarded against Life of Georgia in this case based upon its alleged "pattern and practice" of selling Medicare Supplement policies to persons eligible for Medicaid. Yet Life of Georgia has already been punished for this conduct by the $1 million punitive damages award upheld by this Court in *Foster.* Indeed, Ms. Johnson testified at the *Hammond/Green Oil* hearing in the *Foster* case concerning the Company's alleged fraud at issue in selling her a Medicare Supplement policy. Thus, the amount of punitive damages upheld in *Foster* was justified in part as punishment for the alleged fraud at issue in the present case. Additionally, Ms. Foster was allowed to testify in this case, over Life of Georgia's

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[14] The Trial Court attempted to explain the larger punitive damage award in this case on the ground that Life of Georgia failed to correct the problem of selling Medicare Supplement policies to Medicaid-eligible persons after the complaint was filed in *Foster.* But this reasoning ignored the fact that Ms. Johnson's and Ms. Foster's policies were sold within six months of each other, well *before* the *Foster* lawsuit commenced; that the Company was unaware that Ms. Johnson was on Medicaid until she testified at the *Hammond/Green Oil* hearing in *Foster;* and that Life of Georgia attempted to contact Ms. Johnson to rescind her policy, but was unable to do so because she filed suit instead of communicating with Life of Georgia. *See also Reserve Nat'l Ins. Co.* v. *Crowell,* 614 So. 2d 1005 (Ala.) (affirming remittitur of punitive damages from $1 million to $400,000 in cases involving alleged fraud of insurer in selling Medicare Supplement policies), *cert. denied,* 114 S. Ct. 84 (1993).

objections, concerning the alleged fraud against her, thereby, subjecting Life of Georgia to punishment for that alleged conduct for the second time. Consequently, the award of punitive damages in the case at bar raises the "serious problems" of unconstitutional duplicative punitive damage awards noted by Justice Houston in *BMW*. *See* 646 So. 2d at 630 (Houston, J., concurring); *see also United States v. Halper*, 490 U.S. 435 (1989) (recognizing that imposition of civil penalties is subject to the Double Jeopardy Clause of the United States Constitution); *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (holding that $25 million in punitive damages awarded against an asbestos manufacturer should be reduced to $1 million on the grounds that "the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation"), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).[15]

Fifth, the award is utterly arbitrary when compared to Life of Georgia's profit or potential profit from the transaction. As discussed above, the *gross* revenue

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[15] *See also In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act . . . because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

produced for Life of Georgia by the transaction was the amount of premiums paid -- $3,132. Moreover, Medicare Supplement policies have a very "thin margin" of profitability, and their sale has ordinarily generated very low, if any, profit for Life of Georgia in Alabama. *See* Defendant's Post-Trial Exhibits, Vol. 7, Deposition of James Barth and Deposition of George Priest.

Sixth, the $12,500,000 punitive damage award is grossly disproportionate to the legislatively established fines for conduct analogous to that alleged here. Indeed, the maximum fine for making a "false or fraudulent statement or representation . . . relative to an application for insurance" Ala. Code § 27-12-23, is only $1,000. *See* Ala. Code § 27-1-12; *see also* Ala. Code § 27-12-17 (maximum fine of $1,000 for collecting a premium for insurance which is not provided to the insured). And the maximum fine for *any* felony in Alabama is $20,000, or "[a]n amount not exceeding double the pecuniary gain to defendant or loss to the victim caused by the commission of the offense." Ala. Code § 13A-5-11.

Finally, the jury's punitive damage verdict clearly was not based upon the actual injury to Ms. Johnson or potential harm from Life of Georgia's conduct. Rather, the verdict resulted from an improper calculation designed to punish Life of Georgia for conditions over which the Company had no control that existed largely outside the State of Alabama. In closing argument, Plaintiff's counsel urged the jury to "give a hundred dollars for each" person eligible for Medicaid in all states in which Life of Georgia sold Medicare Supplement policies -- a "verdict for all thirteen states which comes to fifteen million eighty-three thousand two hundred and fifty," R 521. In returning a verdict of $15,000,000, the jury substantially complied with Plaintiff's counsel's request.

Thus, it is clear that the punitive damage verdict "was based in large part on conduct that happened in other jurisdictions." *BMW of North America, Inc.* v. *Gore,* 646 So. 2d 619, 627 (Ala. 1994), *cert. granted,* 63 U.S.L.W. 3555, 63 U.S.L.W. 3562 (1995) (No. 94-896). But this approach to calculating punitive damages is clearly contrary to Alabama law. As this Court emphasized in *BMW,* a jury may not "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award." *Id.* Indeed, the jury's error in calculating punitive damages was substantially more egregious in this case than in *BMW.* The punitive damage verdict in *BMW* was based in part upon alleged wrongful acts actually committed by the company in other jurisdictions. Here, by contrast, punitive damages were assessed based upon a factor for which Life of Georgia bore no responsibility -- namely, the number of people on Medicaid in its sales area. Life of Georgia was punished based simply upon the hundreds of thousands of individuals eligible for Medicaid in thirteen states without there being *any* evidence that Life of Georgia ever sold or even attempted to sell a Medicare Supplement policy to any of them other than approximately ten people. *Cf. Independent Life and Accident Ins. Co. v. Harrington,* No. 1921093, 1994 WL 407246, at * 12 (Ala. Aug. 5, 1994) ("evidence of the total number of similar policies issued in other jurisdictions should not have been considered by the trial court when reviewing whether the amount of the punitive damages award was reasonable, because the jury was not presented with any evidence of the number of similar policies issued outside Alabama that were not properly endorsed or evidence that Independent Life had acted unlawfully in any other jurisdiction").

Although the Trial Court determined that remittitur of the punitive damage award was appropriate, this remittitur did nothing to address the fundamental error that permeated

the jury's calculation of punitive damages. Accordingly, this Court must order further substantial remittitur of the punitive damage award so that it bears a reasonable relationship to the harm that was *actually* incurred by Ms. Johnson and the *realistic* potential harm from Life of Georgia's conduct within the State of Alabama.

B. The Punitive Damage Award Is Retrospective Punishment That Contravenes The Due Process Clause

At the time Life of Georgia sold Ms. Johnson the Medicare Supplement policy, Alabama law generally imposed a $250,000 limit on the amount of punitive damages that could be awarded in a single case. Subsequently, in *Henderson,* this Court struck down the limit on state constitutional grounds. Life of Georgia respectfully submits that *Henderson* was incorrectly decided and that this Court should re-address the constitutionality of the punitive damage limit.[16] But even if this Court reaffirms *Henderson,* the $250,000 limit should be applied in this case because it was the level of punishment in place at the time the conduct at issue here occurred.

"The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483,

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[16] In *Honda,* the Supreme Court stated that the "*Haslip* opinion[] establish[es] that states cannot abolish limits on the award of punitive damages." 114 S. Ct. at 2340 n. 9.

1505 (1994). In applying the federal *ex post facto* clause,[17] the Court has held that a new law is void to the extent it "'makes more onerous the punishment for crimes committed before its enactment.'" *Miller* v. *Florida,* 482 U.S. 423, 435 (1987) (quoting *Weaver* v. *Graham,* 450 U.S. 24, 36 (1981)). And there can be no doubt that "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Landgraf,* 114 S. Ct. at 1507.

The Supreme Court has explicitly recognized that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf,* 114 S. Ct. at 1505 (citations omitted). To apply the *Henderson* decision retroactively to this case would subject Life of Georgia to an additional punishment of $12,250,000 above and beyond what it had notice could be imposed when the Medicare Supplement policy was sold to Ms. Johnson.

C. The Alabama Punitive Damage System Violates The Due Process Clause

To protect against the "acute" danger of arbitrary and excessive punitive damage awards, the Supreme Court of the United States in *Honda* "strongly emphasized the importance of the procedural component of the Due Process Clause [of the Fourteenth Amendment]" in punitive damage cases. 114 S. Ct. at 2335. The Alabama punitive damage system, however, does not include sufficient procedural

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[17] In *Landgraf,* the Court recognized that the Due Process Clause might provide protection against retrospective punishments in civil cases similar to the protections afforded by the *ex post facto* clause in criminal cases. *See* 114 S. Ct. at 1505 (citations omitted).

protections to comport with the Due Process Clause. While the Supreme Court perceived the system as constitutional in *Pacific Mutual Life Insurance Co.* v. *Haslip,* 499 U.S. 1 (1991), events subsequent to *Haslip,* including the verdict in this case, have shown that such a perception is incorrect. *See Armstrong* v. *Roger's Outdoor Sports, Inc.,* 581 So. 2d 414, 423 (Ala. 1991) (Maddox, J., dissenting); *Henderson* v. *Alabama Power Co.,* 627 So.2d 878, 894-95 (Ala. 1993) (Maddox, J., dissenting); *id.* at 914 (Houston, J., dissenting).

The evidence presented by Life of Georgia demonstrates that Alabama's punitive damage system and appellate review of such awards is out of line when compared to Alabama's neighboring states, Georgia, Tennessee and Mississippi. C 236-269. To put it another way, this Court's output of punitive damages in the first *seven months* of 1994 ($7.79 million) exceeded that of Mississippi and Tennessee appellate tribunals -- and fell just short of the Georgia total -- for the last *seven years.* And, over the same seven-year period, the Alabama Supreme Court affirmed **28** times more in punitive damages than the Mississippi Supreme Court, **20** times the amount affirmed by the Tennessee appellate courts, and **13** times the amount affirmed in Georgia. [Copies of charts introduced by Life of Georgia in the post-trial proceedings are attached as Appendix A).

Based upon these figures and other studies, Life of Georgia's expert witness Professor George Priest of Yale Law School testified:

> The punitive damage verdicts in Alabama within the last year and for several years before that are extraordinary in their magnitude and in their frequency. There is nothing like this that has been recorded, I

> think, in the history of American jurisprudence. The *Green Oil* factors are plausible on their face and seem fair and reasonable as the Supreme Court ruled in the *Haslip* case. But for some reason, punitive damage verdicts by juries in Alabama, and even after remittitur, are far above or are severely out of line in comparison with verdicts in neighboring states as well as across the country.

R 574.

These comparisons confirm Justice Maddox's observation that "the Supreme Court of the United States was mistaken" when it found the Alabama system to provide "'meaningful and adequate'" protection against arbitrary punitive damage awards. *Armstrong*, 581 So. 2d at 423 (Maddox, J., dissenting).

* * * *

WL962040.028/3+

IN THE SUPREME COURT OF ALABAMA
May 29, 1996

1940357

Life Insurance Company of Georgia

v.

Mobile Circuit Court
CV-93-969

Daisey L. Johnson

ORDER

The motion by Life Insurance of Georgia to stay execution of judgment pending petition for writ of certiorari to the United States Supreme Court having been filed and duly submitted to the Court,

IT IS ORDERED that the motion to stay execution of judgment is denied.

Hooper, C.J., and Almon, Shores, Kennedy, Ingram, and Cook, JJ., concur.

Maddox, J., dissents. (Dissent attached.)
Butts, J., dissents.

I Robert G. Esdala, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 29th day of May, 1996.

/s/ Robert G. Esdala
Clerk, Supreme Court of Alabama

1940357 - Life Insurance Co. of Ga. v. Johnson
RE: Application for Rehearing and Motion to stay execution of judgment

MADDOX, JUSTICE (dissenting).

I would grant the motion to stay the issuance of the certificate of judgment in this case, pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court by Life of Georgia.

In my dissenting opinion on original deliverance, I articulated my concerns that the majority opinion failed to address many of the federal constitutional issues raised by Life of Georgia. Many of the same issues of federal constitutional law that Life of Georgia argues in this case, and which it no doubt will present to the United States Supreme Court, were presented in BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), cert. granted, ___ U.S. ___, 115 S.Ct. 932 (1995), and the Supreme Court, on May 20, 1996, reversed this Court's judgment and remanded the case to us. BMW of North America, Inc. v. Gore ___ U.S. ___, 1996 WL 26249 (U.S.). In the BMW case, the Supreme Court of the United States addresses many of the concerns that I expressed on original deliverance about Alabama's system of awarding punitive damages in cases involving only economic damages. I would grant rehearing, of course, and the very least this Court could do would be to grant the stay of the execution of this judgment in this case, and review it under the guidelines set out in the BMW case that has just been released.

As I pointed out in my dissent in this case, Life of Georgia raises several constitutional claims that obviously have merit. Alabama's procedures for reviewing awards of punitive damages have been reviewed by the United States

Supreme Court on several occasions. See, Aetna Life Insurance Co. Lavoie, 475 U.S. 813 (1986) and Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991). In Haslip, the Court, although approving Alabama's procedure for reviewing claims of excessive punitive damages awards, said that "[a]s long as discretion is exercised within reasonable constrains [in Alabama], due process is satisfied." 499 U.S. at 22. In Haslip, the Court noted that for future cases the Alabama Legislature had set a cap on punitive damages, thereby suggesting that the cap statute would help to assure that "due process was satisfied." After the release of the United States Supreme Court's decision in Haslip, this Court declared the statute referred to by the United States Supreme Court unconstitutional, thereby at least raising a question of the validity of Alabama's system that allows a jury unguided discretion to make punitive awards reviewable and makes those awards by this Court without reference to the Legislature's policy determination to put a cap on such awards. Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993).

The Supreme Court, in BMW, discusses Haslip, and I am convinced that the Court's latest holding is applicable to the argument that Life of Georgia makes that Alabama's procedures for awarding punitive damages violates its constitutional rights. I have pointed out that awards of punitive damages by Alabama juries, when compared to awards made in neighboring States, are out of line.

There is another reason why I would grant rehearing, and at least order the stay. Although in this case the Court has adopted a bifurcation procedure, which may, or may not, help to "satisfy due process," as defined in Haslip, it has created another constitutional problem. The majority directs that after attorney fees and expenses of litigation are paid from judgments awarding punitive damages, the

remaining amount must be divided between the plaintiff and the State's general fund. As I pointed out in my dissent, that action could implicate the Eighth Amendment's protection against excessive fines and forfeitures. See, Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

In addition, the award of punitive damages in this case could violate the constitutional prohibition against double jeopardy. See, United States v. Halper, 490 U.S. 435 (1989); Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333 (Ala. 1994) (this Court affirmed a $1,000,000 punitive damages award based on a verdict rendered against Life of Georgia for having a pattern and practice of fraudulently selling Medicare supplement policies). The United Supreme Court's recent decision in BMW v. Gore supports this argument. "We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty." BMW, ___ U.S. at ___. (Emphasis added.)

Furthermore, a question involving the power of an Alabama jury to punish a defendant for misconduct that occurred in another State was presented in the BMW case, and the United States Supreme Court reversed the judgment of this court, finding that the $2,000,000 award of punitive damages was "grossly excessive" and, thus, violative of the Fourteenth Amendment's Due Process Clause.

In view of the fact that the so-called "cap" statute that the Supreme Court of the United States noted in Haslip as offering due process protection has now been struck down, and in view of the further fact that the United States Supreme Court has examined the question of punitive damages and the due process clause in a case from Alabama, I would grant the stay. In granting the stay, the Court would be acting in accordance with the suggestion in

Haslip, where the Untied States Supreme Court noted that "[a]s long as discretion is exercised within reasonable constraints [in Alabama], due process is satisfied." Haslip, 499 U.S. at 22. See, Schall v. Martin, 467 U.S. 253, 279 (1984); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 402 U.S. 183, 207 (1979). See also, McGautha v. California, 402 U.S. 183, 207 (1971). In BMW, the Supreme Court found that this Court did not exercise its discretion reasonably and that the constitutional protection of due process of law was not satisfied. I think the Court is guilty once again. Consequently, I dissent.

WL962040.029/3+

FILED
SEP 3 1996
CLERK

No. 96-184

In The

Supreme Court of the United States

October Term, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a GVR order is warranted considering the fact that the Alabama Supreme Court independently reviewed the punitive verdict consistent with the "guideposts" set forth in *BMW v. Gore* and determined that the punitive award, as remitted to $5 million, was appropriate punishment considering the facts of this case.

II. Whether Life of Georgia waived the right to assert in its petition that the punitive damage award constituted improper "extraterritorial punishment" by failing to raise this issue in the trial court, and by specifically stating on appeal to the Alabama Supreme Court that it did not seek reversal based upon Respondent's closing arguments to the jury.

III. Whether this Court should accept plenary review and consider Life of Georgia's contention that the $5 million punitive award is "duplicative punishment" when Life of Georgia failed to properly preserve this issue in the Alabama courts below.

IV. Whether this Court should accept plenary review and consider Life of Georgia's argument that it was not provided fair notice that its illegal conduct would subject it to a substantial punitive punishment in Alabama when Life of Georgia failed to properly preserve this issue in the Alabama courts below.

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STATEMENT OF JURISDICTION

Ms. Johnson agrees that this Court has jurisdiction to consider whether the $5 million punitive award in this case is "grossly excessive" punishment in violation of the Due Process Clause (Question 1). However, Life of Georgia never properly raised Questions 2, 3, and 4 in the Alabama courts below. Accordingly, pursuant to 28 U.S.C. § 1257(a), these newly presented arguments are not properly presented for review.

STATEMENT OF THE CASE

Pursuant to Rule 15, Respondent Johnson takes this opportunity to correct some of the factual statements in the petition, as well as relate to the Court additional facts which Life Insurance Company of Georgia ("Life of Georgia") fails to reveal.

Daisey Johnson sued Life of Georgia alleging that it had engaged in intentional and reckless fraud and fraudulent suppression by selling her a medicare supplement policy that was worthless to her because she was receiving Alabama medicaid benefits. Indeed, Life of Georgia admitted that it was illegal in every state it did business to sell a medicaid-recipient its supplement policy because it provided the same benefits provided by medicaid. Ms. Johnson had dealt with Life of Georgia for many,

many years, during which time she was sold nine different life insurance policies.[1]

Ms. Johnson was 84 years old at the time of trial and resided in rural Clarke County, Alabama. After completing the third grade, she quit school to help her family make a living after her father became ill. She and her thirteen brothers and sisters moved across Alabama, with Ms. Johnson washing, ironing, and cooking to help provide for her family. While living in Selma, Alabama, Ms. Johnson took out her first policy with Life of Georgia (presently a $2.3 billion company) – some time before World War II. Ms. Johnson has never had a checking account or driver's license, and can barely read or write due to her lack of education and physical infirmities.

Sometime before January 8, 1990, Life of Georgia's agent, Barbara Holt, came to Ms. Johnson's home to collect the monthly premiums on these nine life policies. During this visit, Ms. Holt recommended that Ms. Johnson purchase a medicare supplement policy. The next week, Ms. Holt returned and again informed Ms. Johnson that she needed to purchase the supplement policy because it would pay any medical bills that Ms. Johnson might incur in the event she became ill. Based on these representations, Ms. Johnson agreed to purchase the supplement policy, and Ms. Holt filled out the application.

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[1] These nine life insurance policies were all current at the time of trial, and included one policy on Ms. Johnson's nephew, one policy on her son, one policy on one of her brothers, two polices on another brother, three policies on her own life, and one policy for someone named "Daisey Lee Carter," who Ms. Johnson does not know.

This application included several questions to be answered by Ms. Johnson, one of which asked whether she was a medicaid-recipient. To complete the application, Ms. Holt asked to see Ms. Johnson's medicare card. At that time, Ms. Johnson handed Ms. Holt all of her insurance cards, which included her Alabama Medicaid card.

Ms. Holt knew that it was illegal and against company policy to sell the supplement policy to Ms. Johnson if she was on medicaid. Despite the fact that Ms. Johnson handed Ms. Holt her Alabama Medicaid card, Ms. Holt indicated on the application that Ms. Johnson was not on medicaid. Ms. Holt also collected the first month's premium of $71.00 on the policy. Ms. Johnson discovered in 1992 that the supplement policy was worthless because she was on medicaid. By this time, the monthly premiums had risen to $103.00. During the three-year period from 1990 through 1992, Ms. Johnson paid almost one-third of her fixed income for the medicare supplement policy.[2]

Contrary to Life of Georgia's factual assertion in its petition, Ms. Johnson proved that Life of Georgia was itself guilty of a punishable tort under Alabama law. The Alabama legislature modified the common law rule of vicarious liability in 1987 by requiring a plaintiff to prove a higher degree of culpability on the part of the principal before punitive damages can be imposed against the principal for the conduct of its agent. *See* Alabama Code § 6-11-27 (1975). To meet this higher burden of proof, Ms.

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[2] Ms. Johnson received a monthly social security check of approximately $250. *See* Tr. at 511.

Johnson proved that Life of Georgia intentionally employed incompetent agents to sell its supplement policy to individuals who did not need the policy because they were medicaid-recipients. Additionally, Ms. Johnson proved that Life of Georgia's corporate officers actually knew that their agents illegally sold these policies to dual-eligible individuals, but nevertheless, refused to prevent or rectify this illegal behavior.

Ms. Holt, who was terminated by Life of Georgia for misappropriation of premiums, admitted that she never received any specific training with regard to selling the medicare supplement policy. Tr. at 430. Other former agents also testified that they received inadequate training with regard to the sale of Life of Georgia's supplement policy. One agent testified that his training could be summed up in three words – "get the money." Tr. at 188. Another agent stated that he would fear losing his job if he informed the company executives that there were Life of Georgia medicare supplement policyholders who were also on medicaid. In fact, when this agent was asked whether he would want Life of Georgia selling his grandmother a supplement policy, he responded by stating, "I think if someone came to a member of my family and employed the tactics that we were shown, I would probably hunt him down." Tr. at 211-212.

After a number of months, Ms. Johnson began having problems making the monthly premium payments on the supplemental policy. Eric Peek, a former district manager, had been instructed by upper management "to go out and do whatever it takes to get [the] premium caught up" on medicare supplement policyholders who were delinquent on their monthly payments. Accordingly, Mr. Peek

met the collecting agent at Ms. Johnson's home to discuss the past due premiums. Mr. Peek testified that he showed Ms. Johnson a newspaper clipping from the *Mobile Press Register* that he kept "for such purposes" where an Alabama resident had lost her home to a local hospital in a court judgment. Mr. Peek then asked Ms. Johnson, "Which one is going to be easier to afford, the liability of not having the coverage, or the coverage. You know, you could lose your house." Tr. at 146-147. Mr. Peek testified that he typically used this sales technique since "you can't, you know, go out and use a stick on the people naturally, so your primary tool is fear." Tr. at 147. After hearing this sales pitch, Ms. Johnson paid her premiums to keep the policy in force.

Life of Georgia's regional Vice-President was also informed that there were dual-eligible individuals that had been sold this same medicare supplement policy. In response to Mr. Peek's inquiry as to what should be done to correct this problem, the Vice-President instructed Mr. Peek to go back to those individuals and convince them to keep paying on the medicare supplement policies because they "could come off of medicaid and would need the medicare supplement." *See* Tr. at 141. Later, Life of Georgia threatened to fire Mr. Peek for informing individuals that they would not be eligible for the medicare supplement policy if they were on medicaid, *See* Tr. at 143, but he quit before he could be fired.

As Life of Georgia acknowledges, it suffered an adverse verdict in a previous case where two of its agents had sold a medicare supplement policy to an individual that was not on medicare, but on medicaid. *See Foster v. Life Ins. Co. of Georgia*, 656 So.2d 333 (Ala. 1994). After the

verdict was rendered in *Foster*, Mr. Peek, a defendant in the *Foster* case, met with the company's Regional Vice-President and requested that Life of Georgia undertake a program to identify those dual-eligible individuals who had been improperly sold its supplement policy. Additionally, Mr. Peek implored the company to begin properly training its agents as to the sale of its medicare supplement policy. Life of Georgia ignored this request, stating, "we need to find somebody that will buy insurance." Tr. at 147-148. Life of Georgia's Marketing Vice-President, Robert Hayes, further confirmed that Life of Georgia had taken no steps after the *Foster* verdict to discover whether dual-eligible individuals were being sold its medicare supplement policy. Instead, Life of Georgia simply continued to collect premiums on all its medicare supplement policies sold in the State of Alabama.

Life of Georgia claims that its company policy specifies that if a medicare supplement policy were sold to a dual-eligible individual, then the premiums would be returned. It further contends that any agent who improperly sold a supplement policy to a dual-eligible individual would lose all commissions received from the sale. At trial, however, Ms. Johnson proved that these company policies were intentionally ignored. For instance, Ms. Holt was never required to return any commissions she earned by making this illegal sale to Ms. Johnson. Tr. at 458. Additionally, at the post-trial hearing, testimony was presented that Life of Georgia had sold a medicare supplement policy to a 91-year-old medicaid-recipient, that Life of Georgia had been asked to return his premiums, but refused to refund those premiums. This evidence led

the trial court to conclude that it was concerned "as to the quality of Life of Georgia's assertion that it would refund premiums once an unqualified policyholder came forward." Pet. App. at 14a.

Next, Life of Georgia claims that Ms. Johnson improperly focused the jury's attention on Life of Georgia's out-of-state conduct by introducing "pattern and practice" testimony from two individuals who lived in Florida, and then commenting on their testimony during closing. Life of Georgia's objection to this testimony, however, was not based upon any federal constitutional concern, but rather, was based on relevancy grounds. Furthermore, Life of Georgia failed to make any objection to counsel's statements in closing arguments.

At the conclusion of all the evidence, Life of Georgia argued its motion for directed verdict, but never claimed that the punitive claim would constitute "duplicative punishment." And although Life of Georgia now claims that the Alabama punitive damage system contains constitutionally inadequate standards, it failed to submit any alternative jury charges as to how to more clearly charge the jury with regard to the imposition of punitive damages.

The jury thereafter returned a $250,000 compensatory award and a $15 million punitive award. After considerable post-trial discovery, the trial court held a *Hammond/Green Oil* hearing[3] to address Life of Georgia's motions for new trial, remittitur, and/or JNOV. After the hearing on these motions, the trial court entered a very detailed

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[3] *See Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 593 So.2d 218 (Ala. 1989).

and exhaustive opinion concluding that the punitive damage verdict should be remitted to $12.5 million. Ms. Johnson accepted the remittitur, and Life of Georgia appealed to the Alabama Supreme Court.

On November 17, 1995, the Alabama Supreme Court released its opinion upholding the jury's finding that Life of Georgia was guilty of intentional and reckless fraud. Nevertheless, in independently reviewing the record evidence, the Alabama Supreme Court concluded that the $12.5 million punitive award, as remitted by the trial court, exceeded an amount necessary to punish and deter Life of Georgia for its illegal conduct. The Alabama Supreme Court accordingly reduced the punitive award to $5 million, concluding that this amount was justified considering the egregious conduct engaged in by Life of Georgia's corporate officers and sales agents towards not only Ms. Johnson, but other similar Alabama citizens.

The opinion further made substantial procedural and substantive changes to all future trials where punitive damages are sought. The court, in following Justice O'Connor's suggestion made in her dissenting opinion in *Haslip*, held that all punitive damage cases from this point forward shall be bifurcated. In the first phase, the jury will decide liability and award an appropriate compensatory award, and will also decide whether punitive damages are justified. If so, then the trial resumes and all evidence that had previously been admissible in the *Hammond/Green Oil* hearing will be heard by the jury in determining the amount of the punitive damage award. Furthermore, after post-trial review and appellate review, the punitive damage award is to be deposited with the clerk of court, and the clerk is required to divide the

punitive damage award equally between the State of Alabama and the plaintiff, less attorney fees and costs. Contrary to Life of Georgia's contention, these new procedures were not created to address any of Life of Georgia's federal due process arguments. Rather, the Alabama Supreme Court adopted these new procedures on its own intitiative to ensure that defendants are afforded the highest level of due process possible.[4]

On April 27, 1996, on application for rehearing by both parties, the court withdrew its earlier opinion substituting its second opinion. This new opinion clarified its earlier holdings concerning the new procedures to be implemented in future cases, and reaffirmed its earlier findings relating to the $5 million punitive award.

REASONS FOR DENYING THE WRIT

I. A GVR Order Is Not Warranted In This Case Since The Alabama Supreme Court Independently Reviewed The Punitive Damage Award And Remitted The Judgment To $5 Million, And In So Doing, Utilized Those Standards As Set Forth In *BMW v. Gore.*

The Alabama Supreme Court's opinion in this case reveals that it is not based upon a premise that is in conflict with this Court's opinion in *BMW of North America, Inc. v. Gore,* 116 S. Ct. 1589 (1996). To the contrary, the standards utilized by the Alabama Supreme Court in

[4] These new procedures take effect 90 days after the opinion becomes final.

evaluating Life of Georgia's excessiveness claim are totally consistent with this Court's rationale and holding in *BMW*, and for this reason, a GVR order is not warranted.

In a unanimous decision,[5] the Alabama Supreme Court held that the trial court correctly "focused on the conduct of Life of Georgia to determine whether the punishment was excessive in relationship to that conduct." The court also found that the trial judge properly "considered the public policy upon which punitive damages are based: to eradicate intentional conduct by the particular defendant before the court and to deter others from similar conduct." Pet App. at 15a. This rationale is completely consistent with this Court's statement found in *BMW*: "Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition. . . . For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW v. Gore*, 116 S. Ct. at 1595.

The Alabama courts below agreed with the jury's conclusion that Life of Georgia preyed upon "a group of citizens that need[ed] the most protection: elderly, uneducated, and low income." Pet. App. at 13a. Life of Georgia's corporate officers and its sales agents were acutely aware that Ms. Johnson and the other Alabama victims were "easily persuaded, and [that Life of Georgia] used

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[5] All nine justices concurred in the court's decision that the $5 million punitive award was appropriate punishment considering the facts of this case. *See* Pet. App. at 41a.

sales techniques such as 'fear' to sell these policies." Pet. App. at 13a.

The Alabama Supreme Court also independently reviewed the evidence, finding that Life of Georgia had engaged in an intentional fraudulent scheme that was "egregious and reprehensible and resulted in a great financial hardship to some of the most vulnerable members of our society." Pet. App. at 36a. Furthermore, unlike the fraud committed in *BMW*, the Courts below noted that the Life of Georgia agents made affirmative false statements to Ms. Johnson that she needed the medicare supplement policy with actual knowledge that the policy would be totally worthless to her. *See* Pet. App. at 36a-37a. As the Alabama Supreme Court found, "Life of Georgia had no risk under these fraudulently sold policies" and the "practice was a sham and would never have been permitted in this state if the activities of insurance agents were properly regulated." Pet. App. at 37a.

In judging the reprehensibility of a defendant's conduct, there is a vast difference between a failure to disclose, as was the case in *BMW*, and an affirmative intentional misrepresentation accomplished with the intent to deceive. "To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, . . . , or when the target is financially vulnerable, can warrant a substantial penalty." *BMW*, 116 S. Ct. at 1599. In the present case, the Alabama courts noted that both of these factors were present in addressing Life of Georgia's excessiveness argument. Moreover, "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that

no duty to disclose exists." *BMW*, 116 S. Ct. 1601. In the present case, the lower courts found that Life of Georgia's conduct was totally void of any good-faith conduct.

This Court in *BMW* also recognized that repeat offenders should be punished more severely than first offenders. "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. . . Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW v. Gore*, 116 S. Ct. at 1599-1600. And although the Alabama courts did not have the benefit of this Court's opinion in *BMW*, the courts below nevertheless utilized this logic in judging the extent of Life of Georgia's reprehensibility. First, the trial court concluded that even though Life of Georgia had experienced an adverse verdict in the *Foster* case for similar conduct, its corporate officers had done nothing to "ferret out and correct the problem" of its agents illegally selling medicare supplement policy to dual-eligible individuals. The Alabama Supreme Court also utilized this rationale in concluding that Life of Georgia had intentionally defrauded Ms. Johnson, finding that "there was evidence that she was not the only Alabama victim of such fraud."[6] Pet. App. at 12a.

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[6] In its petition, Life of Georgia incorrectly asserts that only one other Alabama citizen had been sold a medicare supplement policy although she was receiving Alabama

The Alabama Supreme Court then stated that it "independently reviewed the evidence in this case," and applied the factors set forth in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989), cited in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), which included the "degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, *and the existence and frequency of similar past conduct.*" *See* Pet. App. at 36a (emphasis added). Based upon this *independent review*, the Alabama Supreme Court concluded that, although it found Life of Georgia's conduct reprehensible, when comparing Life of Georgia's conduct "with other acts perpetrated upon Alabama citizens," it was compelled to again reduce the punitive damage award from $12.5 million to $5 million. Pet. App. at 37a. In so doing, the Alabama Supreme Court properly utilized the standards as explained in *BMW*.

Life of Georgia's attempt to compare the conduct found in *BMW* with the conduct in this case is also without merit. In *BMW*, this Court concluded that "none of the aggravating factors associated with particularly reprehensible conduct" was present in *BMW*. In the present case, Ms. Johnson is no Dr. Gore, as recognized by the Alabama Supreme Court in finding that Life of Georgia's conduct "resulted in a great financial hardship" to

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medicaid benefits. *See* Petition, p. 4. However, at trial, Mr. Peek testified that he was aware of an additional individual who lived in Monroeville, Alabama, who was on medicaid but was also sold a Life of Georgia medicare supplement policy. *See* Tr. at 140, 511.

Ms. Johnson. This fact is particularly important, as Justice Breyer recognized in his concurring opinion in *BMW* where he stated that "tricking the elderly out of their life savings" can fairly be categorized among the "most serious kinds of misrepresentations." *BMW*, 116 S. Ct. at 1605-06. In the present case, Ms. Johnson had *no* life savings, but rather, lived month-to-month on a small social security check.

With regard to the *BMW* proportionality analysis, the $5 million punitive award does not cross the "grossly excessive" threshold. The $5 million punitive award is 20 times Ms. Johnson's compensatory damages as found by the jury. Considering the egregiousness of the fraud, coupled with the fact that Life of Georgia intentionally targeted low income, elderly individuals such as Ms. Johnson to accomplish this fraud, this ratio does not provide the necessary indicium to categorize the award as "grossly excessive."

The Alabama Supreme Court also utilized this Court's third "guidepost" announced in *BMW* in remitting the punitive award to $5 million. As Life of Georgia acknowledges, the Alabama Supreme Court explicitly relied on Alabama's weak regulation of insurance companies as justification for the $5 million punitive award. The court discussed in great length the fact that Alabama citizens who become the victims of fraud have little recourse other than through litigation. Specifically, the court found that the "record in this case is replete with expert testimony to the effect that the State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." Pet. App. at 16a. The Alabama

Supreme Court further noted that the plaintiff has a heavy burden in proving fraud, "but it provides the only recourse a defrauded citizen of Alabama has." Pet. App. at 19a. In making these factual findings, the court necessarily found that Alabama's statutory civil and criminal penalties are seldom, if ever, sought against an insurance company's corporate executives or its agents for intentional fraud. This was shown true in this case, as neither its corporate officers nor the agents involved in this case were ever threatened with any criminal sanctions.

Moreover, Life of Georgia ignores Alabama Code § 13A-8-3 which states that the theft of more than $1,000 is considered a Class B felony that carries with it a maximum $10,000 fine and imprisonment anywhere from two to twenty years. Additionally, an habitual offender, as Life of Georgia was found to be, makes the offense a Class A felony, with a maximum fine of $20,000 and life imprisonment or not more than ninety-nine years or less than ten years. *See* Alabama Code § 13A-5-6 (1975). While Life of Georgia argues that the maximum fine in Alabama for making a false or fraudulent statement relative to an application for insurance is a mere $1,000, alternative criminal sanctions noted above demonstrates that Life of Georgia's illegal conduct with regards to Ms. Johnson carries with it the possibility of imprisonment. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991). While Ms. Johnson does not dispute that the monetary comparisons are wide, the courts below concluded that the verdict, as remitted, is reasonable punishment based upon the objective criteria presented at trial. Because the courts below faithfully applied the three "guideposts" announced in

BMW, no purpose would be served by entering a GVR order.

II. Life Of Georgia Did Not Properly Preserve The Three Remaining Issues In The Courts Below.

This Court wisely refuses to review judgments rendered by a state's highest court unless the federal question was both raised and decided in the state courts below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Herdon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow proper appellate procedures provided by state law is fatal). Alabama law is consistent with federal law: constitutional arguments not raised in the trial court will not be considered on appeal in the Alabama Supreme Court. *Olympia Spa v. Johnson*, 547 So.2d 80, 86 (Ala. 1989). Because Life of Georgia failed to properly preserve the three remaining issues below, these issues should not be considered by this Court.[7]

A. Life Of Georgia Did Not Preserve Its "Extraterritorial Punishment" Argument In The Courts Below.

Although Life of Georgia quotes extensively from respondent's opening and closing statements in its

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[7] Interestingly, Life of Georgia fails to specify where in the courts below it raised these three issues. *See* Rules of the Supreme Court 14.1(g)(i).

petition claiming error, Life of Georgia did not object to these comments at trial, although it objected to other portions of respondent's closing. Tr. 484, 514. Life of Georgia also failed to bring this alleged error to the trial court's attention at the conclusion of closing arguments, although it submitted two motions for mistrial on other grounds. Tr. 474, 477. Further, Life of Georgia never raised this issue in any one of its three post-trial motions for new trial, remittitur, and JNOV, nor in either of its two briefs in support of these motions. *See* Resp. App. at 16-29; Pet. App. at 158a-170a. Finally, Life of Georgia failed to present this legal argument at the *Hammond/ Green Oil* hearing.[8] Tr. at 557-628.

Alabama law is clear – "in order for a party on appeal to complain of comments made at trial by opposing counsel, that party must have objected specifically to those comments, pointing out substantially the language objected to," unless the comments are so grossly improper and highly prejudicial as to be beyond corrective action by the trial court.[9] *McBride v. Acceptance Ins. Co.*, 653 So.2d 978, 981 (Ala. 1995). To hold otherwise

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[8] Ms. Johnson submits that Life of Georgia's failure to object was intentional, since its trial strategy was to present evidence and argue in closing that it had improperly sold its medicare supplement policy to only ten individuals in the thirteen states that it did business, and thus had a "purity rate" of 99.95576% *nationwide*. Accordingly, Life of Georgia was responsible for "opening the door" to this argument, and cannot now complain that Respondent's "reply-in-kind" is in error.

[9] Life of Georgia did not contend on appeal that respondent's statements to the jury were so grossly improper and highly prejudicial as to be beyond corrective action by the trial court so that no objection needed to be made.

"would violate a fundamental principle of appellate jurisdiction: that issues not raised before the trial court may not be raised on appeal." *Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1344 (Ala. 1987); *see also Alabama Power Co. v. Turner*, 575 So.2d 551, *cert. denied*, 111 S. Ct. 2260, 114 L. Ed. 2d 713 (1991).

Even though Life of Georgia failed to object to these comments at trial, it nevertheless raised this issue on appeal for the first time in the Alabama Supreme Court. However, after Ms. Johnson pointed out that Life of Georgia had waived this issue, Life of Georgia voluntarily withdrew this issue from consideration, stating it was *"not seeking reversal of the judgment based upon errors and/or misconduct in counsel's closing argument." See* Resp. App. at 3 (emphasis added).

Thereafter, in its reply brief in support of its application for rehearing, Life of Georgia once again conceded that it was not presenting any federal constitutional challenges to respondent's closing arguments. In brief, Life of Georgia wrote:

> Appellee argues that Life of Georgia somehow waived its federal constitutional challenge to the extraterritorial aspects of the punitive damage award by not objecting to Appellee's closing argument. *Life of Georgia's extraterritoriality argument, however, is not predicated on a challenge to Appellee's closing argument. See* Resp. App. at 6 (emphasis added).

Because Life of Georgia explicitly waived this issue in the courts below, the Alabama Supreme Court properly refused to address this argument, and therefore, a GVR order on this issue should not be granted.

B. Life Of Georgia Did Not Timely And Properly Object To The Imposition Of Punitive Damages In This Case As Being "Duplicative Punishment."

Plenary review on this issue is not appropriate since Life of Georgia never claimed in the trial court that the imposition of punitive damages constituted "duplicative punishment." Moreover, the jury in the present action was presented with separate and additional evidence of intentional wrongful conduct on behalf of Life of Georgia which occurred after the *Foster* case was litigated. As such, Life of Georgia's contention that it was punished "for *both* alleged torts in *each* case" is simply not correct.

Life of Georgia never claimed in its answer to the complaint that a punitive damage award in this case would constitute duplicative punishment in violation of its due process rights. *See* Pet. App. at 155a-157a. Life of Georgia also failed to raise this constitutional issue in its motion for directed verdict at the close of all the evidence. *See* Resp. App. at 9-15. Moreover, although Life of Georgia now complains that the punitive damage claim should have been struck as being repetitive punishment, Life of Georgia itself submitted proposed jury instructions which specifically authorized the award of punitive damages if the jury found by clear and convincing evidence that Life of Georgia had committed intentional fraud.[10] It was only after the jury returned its punitive damage verdict that Life of Georgia wrote the following

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[10] Life of Georgia requested the trial court to charge the jury in accordance with Alabama Pattern Jury Instruction § 18.09. *See* Resp. App. 7-8.

in its post-trial brief in support of its motions for new trial, remittitur, and/or JNOV:

> Moreover, it is arbitrary and capricious for Life of Georgia to be punished on two separate occasions for alleged conduct arising out [sic] similar allegations during the same time period.

In making this statement, Life of Georgia did not cite to any specific provision of the federal constitution under which it made this challenge, nor did it cite any case law to support its contention that the award was "arbitrary and capricious." Alabama law clearly states that in order to preserve a constitutional issue for appellate review, "an appellant must identify and make *specific arguments* regarding what *specific rights* it claims have been violated." *Central Alabama Elec. Co-Op. v. Tapley*, 575 So.2d 551, 553 (Ala. 1991) (emphasis added). In this case, Life of Georgia did neither.

Assuming this Court determines that this issue was properly preserved, the cases cited by Life of Georgia as to this issue are distinguishable from the present fact situation. The intentional fraud perpetrated upon Ms. Johnson by Life of Georgia is not a "mass tort" as described by the cases relied upon by Life of Georgia. Moreover, even in "mass tort" cases, "the vast majority of courts that have addressed [this] issue have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct." *Dunn v. Hovic*, 1 F. 3d 1371, 1385 (3rd Cir. 1993) (citing cases for the same proposition). Considering that Life of Georgia failed to properly preserve this issue for review, as well as the nature of the conduct involved, plenary review should not be granted.

C. Life Of Georgia Never Claimed In The Courts Below That Alabama's Punitive Damage System Failed To Provide It With Fair Notice That Its Illegal Conduct Would Subject It To Punishment Or Of The Severity Of Punishment That Might Be Imposed.

Life of Georgia requests that this Court accept plenary review to revisit the question of whether the Alabama system contains constitutionally adequate standards to constrain the discretion of the juries and courts to impose punitive damages. While Life of Georgia raised this issue in its answer, no alternative standards or proposed jury instructions were submitted to the trial court which the jury could utilize in deciding whether or in what amount to impose punitive damages. In Alabama, as in the federal court system, a defendant must specifically object to the particular jury charge it claims as error, or it must submit written jury charges which specifically informs the trial court how to provide clearer standards. *See* Ala.R.Civ.P. 51; *see also, Alfa Mut. Ins. Co. v. Northington*, 561 So.2d 1041, 1047 (Ala. 1990) ("This Court cannot undertake to review the propriety of a trial court's oral charge unless that charge has been timely objected to and the objection has been overruled by the trial court, or a requested written jury instruction has been refused by the trial court.") Since Life of Georgia never objected to the court's oral charge or provided the court with alternative charges, the Alabama Supreme Court properly refused to address this issue.

Life of Georgia next argues that Alabama law does not provide fair notice of the conduct that will subject it

to punishment, or fair notice of the severity of the punishment. Life of Georgia takes this argument from language found in *BMW v. Gore*, 116 S. Ct. at 1598. Although it is clear that Life of Georgia never claimed that the Alabama system failed to provide fair notice in the courts below, it is equally clear that the trial court specifically requested Life of Georgia to provide it with whatever standards it believed the trial court should utilize in assessing the excessiveness of the punitive damage award. Tr. at 620. To the contrary, Life of Georgia suggested that the trial court utilize the procedures that were approved in *Haslip* in deciding whether the verdict was excessive. The only other additional criteria that Life of Georgia suggested the trial court use was that "if the judicial conscience is shocked by the amount of the award, then a new trial can be ordered." Tr. at 623.

Notwithstanding the above, in 1987, the Alabama legislature passed two statutes providing defendants additional due process safeguards in cases where punitive damages are sought. In this case, unlike in *Haslip*, the jury was instructed that the plaintiff was required to prove by "clear and convincing evidence" that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice" before it could award punitive damages. Alabama Code § 6-11-20 (1975). Additionally, Alabama has modified the common law rule of vicarious liability which required Ms. Johnson to prove a higher degree of culpability on the part of Life of Georgia before punitive damages could be imposed against it for the conduct of its agent. *See* Alabama Code § 6-11-27 (1975).

These two additional safeguards guaranteed Life of Georgia procedural due process protection over and above what was found to be constitutionally adequate in *Haslip*. As such, Life of Georgia's contention that this Court should grant plenary review "to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages" is without merit. This is particularly true since, if this Court denies the petition, the Alabama Supreme Court's opinion will totally change the procedure by which Alabama courts assess punitive damages and provide even higher due process guarantees. For these reasons, plenary review on this issue should be denied.

CONCLUSION

There is no reason for this Court to enter a GVR order instructing the Alabama Supreme Court to reconsider its decision in light of *BMW*. The Alabama Supreme Court, in remitting the punitive award to $5 million, properly utilized the procedures announced in *BMW*. Further, because Life of Georgia failed to preserve the remaining three issues raised in its petition, these issues

are not properly before the Court, and plenary review would therefore be inappropriate.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

LIFE INSURANCE COMPANY OF GEORGIA,	)	Supreme Court No. 1940357
Appellant,	)	
vs.	)	
DAISEY L. JOHNSON,	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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* * *

SUMMARY OF ARGUMENT

* * *

Finally, the $12,500,000 punitive damage award is grossly excessive because it was improperly based on Life of Georgia's status as an out-of-state company. If any punitive damage award is upheld by this Court, the amount should be remitted in light of the $250,000 statutory cap, which was not invalidated until after the conduct at issue occurred.

* * *

V. THE $12,500,000 PUNITIVE DAMAGE AWARD IS GROSSLY EXCESSIVE BECAUSE IT WAS IMPROPERLY BASED UPON LIFE OF GEORGIA'S STATUS AS AN OUT-OF-STATE COMPANY

Plaintiff has failed to provide any legitimate basis for the size of the $12,500,000 punitive damage award in a case where the underlying evidence of fraud was "sharply disputed" and the out-of-pocket loss to Plaintiff was, by her own admission, only $3,132. The only explanation for a punitive damage award of this magnitude is that the jurors were improperly influenced by Life of Georgia's status as an [sic] large, out-of-state company.

Indeed, the astounding size of the award suggests that jurors simply followed Plaintiff's counsel's request that they award $100 for each of the hundreds of thousands of people *eligible* for Medicaid in the thirteen States in which Life of Georgia conducted business. After Plaintiff's counsel urged a punitive damages award of $15,083,250 based upon this calculation, R 520-21, the jury

substantially complied with this request, returning a punitive damage verdict of $15,000,000. In short, Life of Georgia was punished simply because it is a large company that does business in several states.

Plaintiff attempts to divert the Court's attention from this point by arguing that that [sic] Life of Georgia waived the issue by not objecting to Plaintiff's counsel's closing argument in the trial court. *See* Appellee's Br. at 92-93. This argument mischaracterizes the nature of the issue presented for this Court's review. Life of Georgia is not seeking reversal of the judgment based upon errors and/or misconduct in counsel's closing argument. Rather, Life of Georgia contends that, in reviewing the punitive damage award for excessiveness, this Court should consider the extent to which it reflects punishment based upon Life of Georgia's status as an out-of-state company – an issue that clearly was raised in the trial court.[6] As this Court made clear in *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 63 U.S.L.W. 3555, 63 U.S.L.W. 3562 (1995) (No. 94-896), and *Independent Life and Accident Ins. Co. v. Harrington*, No. 1921093, 1994 WL 407246, at *12 (Ala. Aug. 5, 1994), both of which

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[6] *See* Brief in Support of Defendant Life Insurance Company of Georgia's Motion For New Trial, Or In The Alternative, For JNOV, Or In The Alternative, For Remittitur at 21 n.7 ("The Supreme Court has suggested that a state punitive damage system that discriminated against out-of-stae [sic] companies might violate the Due Process Clause as well as other federal constitutional provisions. To the extent that the arbitrary verdict here can be explained by such discrimination against Life of Georgia, it would violate due process, as well as the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution.").

were decided after the trial in this case, remittitur of a punitive damage award should be ordered to the extent that it reflects improper consideration of out-of-state factors.

* * *

THE SUPREME COURT OF ALABAMA

NO. 1940357

LIFE INSURANCE COMPANY OF GEORGIA, INC.,

Appellant,

v.

DAISEY L. JOHNSON,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA
CV-93-969

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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* * *

III. LIFE OF GEORGIA PRESERVED ITS ARGUMENT THAT THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY BASED UPON OUT-OF-STATE FACTORS

Appellee argues that Life of Georgia somehow waived its federal constitutional challenge to the extraterritorial aspects of the punitive damage award by not objecting to Appellee's closing argument. Life of Georgia's extraterritoriality argument, however, is not predicated on a challenge to Appellee's closing argument. Rather, Life of Georgia's argument is that its punishment cannot be upheld because it is unconstitutionally based on the Company's status as an out-of-state company providing products in many States. This argument was fully briefed on the merits in this Court and clearly preserved for appeal, given that, as Appellee acknowledges, Life of Georgia advanced the federal constitutional arguments below "that the Alabama system of awarding punitive damages was flawed in that it discriminated against out-of-state defendants." Appellee's Opp. at 11 (emphasis in original omitted).[3]

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[3] To the extent this Court intended to purge the award of its extraterritorial effects by remitting it to $5 million, Life of Georgia respectfully submits that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause require, at the very least, that the Court expressly state how such a remittitur cures the constitutional defect.

DAISEY L. JOHNSON V. LIFE INSURANCE COMPANY OF GEORGIA, et al., CIVIL ACTION NO. CV-93-969

DEFENDANT LIFE OF GEORGIA'S REQUESTED JURY CHARGES

1.	APJI § 8.00	GIVEN ___	REFUSED ___
2.	APJI § 8.02	GIVEN ___	REFUSED ___
3.	APJI § 11.00	GIVEN ___	REFUSED ___
4.	APJI § 11.01	GIVEN ___	REFUSED ___
5.	APJI § 11.02	GIVEN ___	REFUSED ___
6.	APJI § 11.03	GIVEN ___	REFUSED ___
7.	APJI § 11.03	GIVEN ___	REFUSED ___
8.	APJI § 18.00	GIVEN ___	REFUSED ___
9.	APJI § 18.01	GIVEN ___	REFUSED ___
10.	APJI § 18.02	GIVEN ___	REFUSED ___
11.	APJI § 18.03	GIVEN ___	REFUSED ___
12.	APJI § 18.04	GIVEN ___	REFUSED ___
13.	APJI § 18.05	GIVEN ___	REFUSED ___
14.	APJI § 18.06	GIVEN ___	REFUSED ___
15.	APJI § 18.07	GIVEN ___	REFUSED ___
16.	APJI § 18.08	GIVEN ___	REFUSED ___
17.	APJI § 18.09	GIVEN ___	REFUSED ___
18.	APJI § 18.10	GIVEN ___	REFUSED ___
19.	APJI § 28.00	GIVEN ___	REFUSED ___
20.	APJI § 28.01	GIVEN ___	REFUSED ___

21. APJI § 28.02 GIVEN ___ REFUSED ___
22. APJI § 29.00 GIVEN ___ REFUSED ___
23. APJI § 29.01 GIVEN ___ REFUSED ___

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON Plaintiff, v. LIFE INSURANCE COMPANY OF GEORGIA INC. Defendants.	§ § § § § § § §	Case No. CV-93-969

DEFENDANT LIFE INSURANCE COMPANY OF GEORGIA'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE

Defendant Life Insurance Company of Georgia ("Life of Georgia") moves the court to direct a verdict in its favor as to each claim in plaintiff's complaint, as last amended, separately and severally, and aver the following separate and several grounds:

COUNT ONE – (FRAUD)

1. Plaintiff has failed to prove a prima facie case of fraud (i.e., intentional fraud, reckless fraud, misrepresentation, suppression of material facts) against Life of Georgia.

2. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of fraud (i.e., intentional fraud, reckless fraud, misrepresentation, suppression of material facts).

3. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of fraud (i.e.,

intentional fraud, reckless fraud, misrepresentation, suppression of material facts).

4. Plaintiff has failed to produce substantial evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

5. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

6. Plaintiff has failed to produce substantial evidence that Life of Georgia misrepresented material facts to plaintiff.

7. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia misrepresented material facts to plaintiff.

8. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged misrepresentations of material facts or suppression of material facts.

9. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged misrepresentations of material facts or suppression of material facts.

10. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged fraud more than two years prior to the filing of plaintiff's complaint.

COUNT TWO – NEGLIGENCE/WANTONNESS

11. Plaintiff has failed to prove a prima facie case of wantonness against Life of Georgia.

12. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of negligence.

13. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of wantonness.

14. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of wantonness.

15. Plaintiff's negligence and wantonness claims are barred by the statute of limitations because the alleged negligent or wanton acts undisputedly occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

COUNT THREE – BREACH OF FIDUCIARY DUTY

16. Plaintiff has failed to prove a prima facie case for Breach of Fiduciary Duty against Life of Georgia.

17. Plaintiff has failed to produce substantial evidence that Life of Georgia breached a fiduciary duty allegedly owed by Life of Georgia to plaintiff.

18. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia breached a fiduciary duty allegedly owed by Life of Georgia to plaintiff.

19. Under Alabama law, Life of Georgia did not owe plaintiff any fiduciary duty. *See Guinn v. American Intergrity Ins. Co.*, 568 So. 2d 760 (Ala. 1990). In *Guinn*, the

Alabama Supreme Court affirmed dismissal of plaintiff's claim of breach of fiduciary duty arising out of the sale of a medicare supplement policy. The plaintiff alleged that the defendants owed her a fiduciary duty because of her "advanced age, lack of mental strength, lack of knowledge of insurance matters, and the agents' superior knowledge concerning insurance." *Guinn*, 568 So. 2d at 764. In rejecting the plaintiff's arguments on appeal, the Supreme Court stated "[t]he salesperson and his principal may be liable for damages if he misrepresents material facts in an attempt to induce the prospective customer to enter into the contract. . . . However, *that potential liability does not indicate the existence of a fiduciary relationship.*" *Id.*

20. Plaintiff's breach of fiduciary duty claim is barred by the statute of limitations because the alleged breach of fiduciary duty undisputedly would have occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

COUNT FOUR – SUPPRESSION

21. Plaintiff has failed to prove a prima facie case of suppression of material facts against Life of Georgia.

22. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of suppression of material facts.

23. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of suppression of material facts.

24. Plaintiff has failed to produce substantial evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

25. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia owed plaintiff a duty to disclose material facts to plaintiff.

26. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged suppression of material facts.

27. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged suppression of material facts.

28. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged suppression of material facts more than two years prior to the filing of plaintiff's complaint.

COUNT FIVE – DECEIT

29. Plaintiff has failed to prove a prima facie case of deceit against Life of Georgia.

30. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of deceit.

31. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of deceit.

32. Plaintiff has failed to produce substantial evidence that plaintiff justifiably relied upon any alleged deceit.

33. Plaintiff has failed to produce clear and convincing evidence that plaintiff justifiably relied upon any alleged deceit.

34. Plaintiff's fraud claims are barred by the statute of limitations because plaintiff discovered or should have discovered the alleged deceit more than two years prior to the filing of plaintiff's complaint.

COUNT SIX – OPPRESSION

35. Under Alabama law, plaintiff does not have any cause of action for oppression.

36. Plaintiff has failed to prove a prima facie case of oppression against Life of Georgia.

37. Plaintiff has failed to produce substantial evidence that Life of Georgia was guilty of oppression.

38. Plaintiff has failed to produce clear and convincing evidence that Life of Georgia was guilty of oppression.

39. Plaintiff's oppression claim is barred by the statute of limitations because the alleged oppression undisputedly would have occurred in January 1990 more than two years prior to the filing of plaintiff's complaint on March 31, 1993.

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading by depositing the same in United States mail, properly addressed with first class postage prepaid, to the following counsel of record:

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Done this 2nd day of June, 1994.

/s/ James W. Lampkin II

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON Plaintiff, v. LIFE INSURANCE COMPANY OF GEORGIA INC. Defendant.	§ § § § § § § § §	Case No. CV-93-969 (Filed Jun. 21, 1994)

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia") moves the Court to set aside the verdict of the jury and judgment entered thereon in favor of plaintiff and to enter judgment in accordance with the motions for directed verdict filed at the close of plaintiff's evidence and again at the close of all the evidence and enter judgment notwithstanding the verdict; or alternatively, for a new trial; and further in the alternative, for remittitur pursuant to general remittitur law in Alabama as well as pursuant to requirements of the Court set forth in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 593 So. 2d 218 (Ala. 1989). As grounds therefore, Life of Georgia assigns the following grounds, separately and severally, as to judgment on each verdict, separately and severally:

1. Plaintiff failed to sustain her burden of proof in regard to producing substantial evidence that plaintiff justifiably relied upon defendant's alleged misrepresentation to her detriment.

2. Plaintiff failed to prove by substantial evidence all the requisite elements of fraud.

3. Plaintiff failed to establish a *prima facie* case.

4. There is insufficient evidence that defendant was guilty of fraud as alleged by plaintiff to sustain judgment on the verdict.

5. Plaintiff failed to prove the requisite evidence of justifiable reliance.

6. The record affirmatively shows defendant was not guilty of fraud or misrepresentation as alleged by plaintiff.

7. Plaintiff failed to prove by clear and convincing evidence that Life of Georgia was guilty of fraud and such proof is required to warrant submitting a punitive damage claim to a jury and to support an award of punitive damages.

8. The Court erred by not granting Life of Georgia's motion for summary judgment as to Counts Two and Three of plaintiff's complaint prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

9. The Court erred by not granting Life of Georgia's motion in limine concerning evidence of failure to train, monitor and supervise agents and breach of fiduciary duty as claimed by plaintiff prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

10. The Court erred in denying Life of Georgia's motion in limine to exclude evidence concerning Barbara Holt's termination and the reasons therefore and allowing plaintiff to introduce this evidence. This evidence was immaterial, irrelevant, unduly prejudicial and constituted inadmissible hearsay. The admission of this evidence was so prejudicial as to deny Life of Georgia a fair trial.

11. The Court erred in allowing each category of evidence which was the subject of Life of Georgia's motion in limine, which was denied. The admission of each category of evidence outlined in that motion was so prejudicial as to deny Life of Georgia a fair trial.

12. The Court erred in overruling defendant's objections to evidence offered by plaintiff. More specifically, but without waiving any objections not set out herein, the trial court erred in allowing plaintiff to produce pattern and practice evidence from Mattie Foster, Rosa D. James and Annie Ruth McCovery because plaintiff failed to lay the proper predicate that there was a substantial similarity between those incidents and the case at hand. Additionally, this evidence did not constitute a pattern or practice of fraud as contemplated by Alabama law. The trial court erred in allowing plaintiff to produce evidence from Eric Peek, Bobby Creps and Russell Clark over Life of Georgia's objections. This evidence should not have been admitted for the reasons contained in Life of Georgia's motion for summary judgment and motion *in limine.* The trial court erred in allowing plaintiff to introduce plaintiff's exhibits 29, 30, 31, 32, 33, 34 and 41 over Life of Georgia's objections.

13. The Court erred in excluding evidence that Life of Georgia had paid claims on behalf of plaintiff pursuant to the terms of the Medicare supplement policy and refusing to allow Life of Georgia to introduce Defendant's Exhibit 20. The exclusion of this evidence was highly prejudicial to Life of Georgia.

14. The Court erred in not granting defendant's motion for directed verdict as to all counts of plaintiff's complaint at the close of plaintiff's evidence, and again at the close of all the evidence.

15. The Court erred in not granting Life of Georgia's motion for directed verdict as to Counts Two and Three of plaintiff's complaint prejudicing defendant in that it allowed the jury to hear prejudicial evidence later ruled not material or relevant to the issue submitted to the jury.

16. The Court erred in denying defendant's motion for mistrial after plaintiff voluntarily dismissed Counts Two and Three immediately prior to the case being submitted to the jury and after the jury was allowed to hear prejudicial evidence that was not material or relevant to the issue submitted to the jury.

17. There was improper argument by counsel for plaintiff in closing argument, which was objected to and said objections were overruled. This improper argument was highly prejudicial, intended to inflame the jury and a comment upon the wealth of Life of Georgia. The improper argument denied Life of Georgia a fair trial.

18. The Court erred in commenting on the evidence produced during the trial. During the presentation of Life of Georgia's defense concerning the training provided to

agents, the Court, in the presence of the jury, commented to the effect: "Do we have to hear any more of this?" This comment constitutes an improper comment on the evidence by the Court and was highly prejudicial to Life of Georgia.

19. Plaintiff failed to sustain her burden of proof in regard to the imposition of *any* punitive damages in this case in that plaintiff failed to sustain her burden of proving what is required prior to the imposition of punitive damages by Alabama Code § 6-11-20 (Supp. 1993) (proof by clear and convincing evidence) and § 6-11-27 (Supp. 1993) (principal not liable for actions of servant). Moreover, plaintiff failed to sustain her burden of proof that Life of Georgia acted "maliciously, oppressively and/or grossly" as required by Alabama Code § 6-11-20 (Supp. 1993).

20. The verdicts are contrary to the law of the case.

21. The verdicts are contrary to the facts of the case.

22. The verdicts are not sustained by the great preponderance of the evidence.

23. The verdicts are based on speculation and conjecture.

24. The verdicts are excessive in regard to the facts and/or the law.

25. The amount of the verdicts is opposed to the clear and convincing weight of the evidence and accordingly fails to do justice.

26. The amount of the verdicts demonstrate that they are the result of improper bias, prejudice or passion.

27. There is insufficient evidence in the record to sustain any award of damages for mental anguish.

28. The award of compensatory damages against Life of Georgia was excessive and not supported by the evidence.

29. The award of punitive damages against Life of Georgia was excessive and not supported by the evidence.

30. The verdict rendered against Life of Georgia is the result of improper passion, bias or prejudice caused by the Court's rulings admitted [sic] evidence concerning: (1) training, supervision and monitoring of agents, (2) breach of fiduciary duty; (3) pattern and practice witnesses, and (4) the termination of Barbara Holt's employment and the reasons therefore. This evidence was immaterial, irrelevant and unduly prejudicial to the issues submitted to the jury. This evidence was introduced solely to inflame the passions and prejudice the jury against Life of Georgia and denied Life of Georgia a fair trial.

31. Venire members either did not answer or did not truthfully answer questions posed to them during voir dire so that Life of Georgia was deprived of its right to fully examine members of the venire before Life of Georgia had to exercise its strikes. This error was so prejudicial that it deprived Life of Georgia of a fair trial.

32. The Court committed reversible error in denying defendant's motion that its Affirmative Defenses relating to plaintiff's claims for punitive damages were sustained.

33. The Court committed reversible error in denying defendant's motion that is [sic] Affirmative Defenses relating to the unconstitutionality of plaintiff's claims for punitive damages were sustained.

34. The evidence will only sustain a compensatory award of the amount of premiums plaintiff lost, and not any award for mental anguish, on the grounds that there is no or insufficient evidence of mental anguish actually suffered by plaintiff.

35. Separate from the question whether there was sufficient evidence of fraud to submit to the jury, there was insufficient evidence to sustain plaintiff's burden of proof pursuant to Alabama Code §§ 6-11-20 (Supp. 1992) and accordingly no award of punitive damages may be sustained.

36. Plaintiff's claim for punitive damages is invalid in that the authority on which the claim is based is unconstitutional on the following joint and several constitutional grounds: a) The prohibition against ex post facto law is violated; b) Due process of law is denied; c) The equal protection of the laws is denied; d) Excessive fines and unusual punishments are imposed; e) Defendant's privileges or immunities are abridged; f) The authority is arbitrary, capricious of [sic] unreasonable; g) The authority or its effect is a law impairing the obligations of contract; h) The authority and its effect deprives defendant of liberty or property without due process of law.

37. With regard to the judgment on the punitive damage verdict, the lack of sufficient standards violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of

the Alabama Constitution (1901). Further, the imposition of damages violates the Eighth Amendment to the United States Constitution. The judgment also violates Article I, Sections 15 and 22 of the Alabama Constitution (1901) and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The procedures for the award of punitive damages violates this defendant's right to a jury trial pursuant to state and federal constitutions.

38. Pursuant to a proper *Hammond/Green Oil* analysis, Life of Georgia is entitled to remittitur of the compensatory and punitive damage awards for reasons which will be set forth in more detail in a proposed Order on Post-Trial Motions which Life of Georgia will file, and which will address the appropriate *Hammond/Green Oil* factors, discussed more fully in D. Carr, *Punitive Damages and Post-Verdict Procedures: Where Are We Now and Where Do We Go From Here?* 51 Ala. Lawyer 90 (March, 1990) and A. Citrin, *Post-Judgment Review of Punitive Damages: A Four Step Approach to Hammond and Green Oil*, Vol. 11, No. 2 Alabama Trial Lawyers Journal 26 (Summer 1991). In sum, applying the proper *Hammond/Green Oil* factors as discussed in the two articles cited to the case at bar mandates a substantial remittitur of both the compensatory and the punitive award.

WHEREFORE, Life of Georgia respectfully submits it is entitled to judgment notwithstanding the verdict; or in

the alternative, to a new trial; or further in the alternative, to remittitur of the compensatory and/or the punitive awards.

/s/ Davis Carr
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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing pleading by depositing the same in United States mail, properly addressed with first class postage prepaid, to the following counsel of record:

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Done this day, June 21, 1994.

/s/ James W. Lampkin II

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON Plaintiff, v. LIFE INSURANCE COMPANY OF GEORGIA INC. Defendant.	§ § § § § § § § §	Case No. CV-93-969 (Filed Jun. 30, 1994)

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL, OR IN THE ALTERNATIVE, FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia") amends its Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial, or in the alternative, for Remittitur and says as follows:

1. Life of Georgia expressly adopts and incorporates paragraphs 1 through 38 of its original post-trial motion as set forth fully herein.

39. The punitive damage award is due to be remitted from $15 million down to $250,000.00 pursuant to Ala. Code § 6-11-21 (Supp. 1993).

40. On June 25, 1993, the Alabama Supreme Court released its opinion in *Henderson* and held that Ala. Code § 6-11-21 (Supp. 1993) violated the Alabama Constitution.

41. On June 24, 1994, the United States Supreme Court released its opinion in *Honda Motor Co. v. Oberg*, ___ U.S. ___ (1994 WL 276687 June 24, 1994). In its opinion,

the Court specifically recognized that its previous opinions in *TXO* and *Haslip* prevent state courts from abolishing limits on punitive damage awards. The Court stated "the TXO and Haslip opinions establish that States *cannot abolish limits on the award of punitive damages.*" *Oberg*, ___ U.S. at ___, 1994 WL 276687 at 9, n. 9.

42. Pursuant to the Supremacy Clause of the United States Constitution, *Oberg* overrules this Court's opinion in *Henderson* and re-establishes the cap on punitive damages under Ala. Code § 6-11-21 (Supp. 1993). Accordingly, the punitive damage award is due to be remitted pursuant to Ala. Code § 6-11-21 (Supp. 1993).

WHEREFORE, Life of Georgia respectfully submits it is entitled to judgment notwithstanding the verdict; or in the alternative, to a new trial; or further in the alternative, to remittitur of the compensatory and/or the punitive awards.

/s/ Davis Carr
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Done this day, June 30, 1994.

/s/ James W. Lampkin II

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DAISEY L. JOHNSON Plaintiff, v. LIFE INSURANCE COMPANY OF GEORGIA INC. Defendant.	§ § § § § § § § §	CASE NO: CV-93-969

DEFENDANT'S SECOND AMENDED MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, OR, IN THE ALTERNATIVE, MOTION FOR REMITTITUR

Defendant Life Insurance Company of Georgia ("Life of Georgia"), amends its Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial, or in the alternative, for Remittitur and states as follows:

1. Life of Georgia expressly adopts and incorporates paragraphs 1 through 38 of its original post-trial motion and paragraphs 39 through 42 of its amended post-trial motion as if fully set fully herein.

2. As additional grounds in support of this motion Life of Georgia would show that the verdict was based upon evidence from Life of Georgia's former employee Eric Peek, whose testimony, in part, is believed to constitute perjury, namely testimony concerning the training of agents concerning the Medicare supplement policy.

3. This amendment constitutes a clarification of the grounds set forth in Life of Georgia's original motion in

paragraphs 9, 11, 12 and 30. However, those paragraphs are not nor are they intended to be limited by this amendment.

WHEREFORE, Life of Georgia, requests this Court enter judgment in its favor, notwithstanding the verdict, or, in the alternative, that Life of Georgia be granted a new trial, or, in the alternative that Life of Georgia be granted a remittitur for the reasons set forth above and for the reasons set forth in Life of Georgia's original motion and amended motion.

/s/ James W. Lampkin II
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Done this day, September 15, 1994.

/s/ James W. Lampkin II

No. 96-184

Supreme Court, U.S.
FILED
SEP 13 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LIFE INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

DAISEY L. JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioner Life Insurance Company of Georgia ("Life of Georgia") respectfully files this memorandum in reply to respondent's brief in opposition to certiorari.

In the Petition ("Pet."), Life of Georgia demonstrated that at the very least, the Court should grant *certiorari*, vacate the judgment and remand this case for further consideration in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). Life of Georgia also showed that the Court should grant plenary review to decide whether the punitive damage award in this case violates the Due Process Clause. Although this Court's decision in *BMW* was not released until almost a month after the Alabama Supreme Court issued its opinion on applications for rehearing in this case, respondent contends that the Alabama court "faithfully applied" the standards set forth in *BMW*. Moreover, although the Alabama Supreme Court in this case expressly and unequivocally rejected Life of Georgia's argument that the punitive damage award violated the Due Process Clause, Respondent's Brief in Opposition ("Opp.") nonetheless unaccountably argues at length that this Court lacks jurisdiction to review three of the four due process questions presented in the Petition and that Life of Georgia otherwise waived its constitutional claim. Opp. at 1, 16-23. Life of Georgia will address each of the arguments in turn.

1. Little needs to be said about respondent's hyperbolic reinterpretation of the factual background of this case, other than to point out that respondent, in her strenuous efforts to characterize Life of Georgia's conduct as "reprehensible," fails to dispute -- because she cannot -- that the sale of Medicare Supplement policies to tens of thousands of older

Americans was a legitimate, lawful activity that yielded tremendous social benefits in all but a few isolated cases. Life of Georgia further notes the continuing confusion in respondent's argument as to why Life of Georgia should be held liable. Respondent first concedes that agent Barbara Holt "knew that it was illegal and against company policy to sell the supplement policy to Ms. Johnson if she was on [M]edicaid," Opp. at 3, and does not deny the undisputed testimony that Ms. Holt asked respondent whether she was on Medicaid, *see* Pet. at 11-12 & n.4. Yet, respondent contends that Life of Georgia should be liable because it did not provide adequate training to Ms. Holt and should have known that Ms. Holt was "incompetent." Opp. at 4. There was absolutely no evidence at trial (nor is any offered by respondent now) that Ms. Holt's purported lack of competence caused her to sell a Medicare Supplement policy to respondent. Indeed, after the completion of evidence and before submission of the case to the jury, respondent withdrew her negligent training claim.

2. Respondent's assertion that the Alabama Supreme Court in this case "faithfully applied the three 'guideposts' announced in *BMW*," Opp. at 15-16, is fanciful. The Alabama Supreme Court undertook in this case exactly the same form of review that it applied in its review of the punitive damage award at issue in *BMW*. And it arrived at an indistinguishable result: imposition of a multi-million dollar penalty that is not moored to any standard or benchmark. In both cases, quite simply, the Alabama court pulled a number out of the air. As it already has done with three similarly postured cases from Alabama, *see* Pet. at 8 n.3, this Court should remand for further consideration.

Respondent's attempts to reshape the decision of the Alabama Supreme Court to reflect this Court's *BMW* guidance is unpersuasive. For example, in asserting that Life of Georgia's conduct is so "reprehensible" that it

deserves a $5 million penalty in this case (in addition to the $1 million imposed for the same conduct in *Foster v. Life Ins. Co. of Georgia*, 656 So. 2d 333 (1994)), respondent emphasizes that Life of Georgia's conduct hurt "low income, elderly individuals." Opp. at 14. In doing so, respondent focuses on her economic status and generalizes her case. What she fails to note, as did the Alabama Supreme Court, is that the Medicare Supplement policies helped thousands of lower income, elderly individuals. *See* Pet. at 10-11. Moreover, what was at issue in this case was Life of Georgia's sale of a Medicare Supplement policy to one individual, respondent, not the propriety of such policies. More to the point, the Alabama Supreme Court did not articulate any "standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damage awards." *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring).

Respondent not surprisingly attempts to elide the second *BMW* factor -- proportionality -- which clearly was not considered by the Alabama Supreme Court and which clearly compels a substantial reduction of the punitive damage award. *See* Pet. at 12-13. In particular, respondent offers no justification to support a punitive damage award that is 20 times "mental anguish" damages that are themselves grossly excessive, nor does she attempt to justify the fact that the punitive damage award is 1,600 times respondent's economic loss, other than to say in effect that Life of Georgia's conduct is so reprehensible that proportionality should not matter. *See* Opp. at 14. The point in looking to proportionality, *in addition to reprehensibility*, is to have a *separate* basis for assessing the excessiveness of an award. To justify a "breathtaking" 1,600:1 ratio by pointing to alleged reprehensibility is to read the proportionality section out of the Court's *BMW* analysis.

Respondent's claim that the Alabama Supreme Court "utilized this Court's third 'guidepost' announced in *BMW* in remitting the award to $5 million," Opp. at 14, is nonsensical. Nothing in the Alabama Supreme Court's opinion uses any legislatively established sanction as a benchmark for arriving at the $5 million penalty imposed in this case. Nor could the Alabama court have found any legislative justification for such a steep fine, because there simply is none. Indeed, respondent herself "does not dispute that the monetary comparisons are wide," but falls back "upon the objective criteria presented at trial," Opp. at 15, whatever that means.

It simply is impossible to credit respondent's assertion that the Alabama Supreme Court "faithfully applied the three 'guideposts' announced in *BMW*." Opp. at 15-16. The Alabama court did not have the benefit of the *BMW* decision before it assessed millions of dollars in punitive damages, and it did not betray any prescience that this Court would strike down the award that the Alabama court had assessed in *BMW*, which was a product of the same procedures that it used in this case. *Cf.* Pet. App. at 186a (Maddox, J., dissenting from denial of stay) ("In *BMW*, the Supreme Court found that this Court did not exercise its discretion reasonably and that the constitutional protection of due process of law was not satisfied. I think the Court is guilty once again."). This Court should remand to give the Alabama Supreme Court the opportunity in reality to apply *BMW* "faithfully."

3. Respondent attempts to avoid plenary review in this Court, not by any cogent dispute on the merits, but by arguing that Life of Georgia did not preserve its claim that the punitive damage award violates the Due Process Clause. This argument is utterly without basis in the record, which is replete with assertions by Life of Georgia of its due process claim. *See* Pet. App. at 155a (asserting in the

Answer that the "imposition of punitive damages in this case would violate the Due Process Clause"); 156a-157a (asserting in the Answer nine separate ways in which a punitive damage award would violate the Fourteenth Amendment, including that "[t]here is no limit placed on the amount of the award," "[t]here are no provisions for clear and consistent appellate standards of review" and "[t]he standards of conduct upon which punitive damages are sought are vague and ambiguous"); 159a-166a (arguing in the post-trial brief that the Alabama punitive damage system "violates the Due Process Clause of the Fourteenth Amendment" for a variety of reasons, including that due process requires "that 'a person of ordinary intelligence' have fair notice as to what the law commands or forbids"); 166a-170a (arguing in the post-trial brief that the award in this case is "grossly excessive" in violation of "the Due Process Clause of the Fourteenth Amendment"); 172a-181a (arguing on appeal that the award in this case "contravenes . . . the Due Process Clause of the Fourteenth Amendment" for a number of reasons, including because it "subject[ed] Life of Georgia to punishment for that alleged conduct for the second time").

The Alabama Supreme Court explicitly addressed Life of Georgia's due process claim:

> [T]he due process provisions of the Fourteenth Amendment have been the basis of constitutional challenges where, as in this case, the defendant argues that the award of punitive damages is grossly excessive and fundamentally unfair and therefore contravenes Alabama law and the Due Process Clause of the Fourteenth Amendment. . . . These arguments have been carefully considered by this Court. . . . It is the opinion of this Court that $5

> million is not excessive for punishment and deterrence specific to Life of Georgia, considering all the facts of this case.

Pet. App. at 11a, 37a. This ruling on Life of Georgia's due process claim is fatal to respondent's preservation claims: "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Respondent also appears to confuse a due process "claim" with the particular "arguments" made in support of such a claim. Thus, respondents seek support from *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, this Court would not consider whether a statute denied substantive due process because "petitioners did not raise a substantive due process *claim* in the state courts, and no state court has addressed such a *claim*." *Id.* at 533 (emphasis added). In this case, Life of Georgia clearly and consistently raised its due process *claim* from the beginning of the litigation through appeal to the Alabama Supreme Court, and that court addressed the due process claim.

To the extent that Life of Georgia has refined and supplemented its due process *arguments* or articulated the due process question with greater specificity in this Court, it is well settled that the "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 197-98 (1899); *see, e.g., Stanley v. Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Illinois v. Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in

the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf . . . of a federal claim be raised and decided below.").

Respondent's various assertions that Life of Georgia did not properly raise objections under state law -- for example, to counsel's opening and closing arguments urging the jury to punish Life of Georgia for out of state conduct -- are irrelevant. *See* Opp. at 16-18. Life of Georgia did not and does not contend that counsel's argument was improper as a matter of Alabama substantive or procedural law, so it had no obligation to object to the argument.[1] Rather, Life of Georgia contends that the punishment imposed -- based as it was in part on Life of Georgia's out of state conduct -- violated the Due Process Clause. This argument regarding the due process claim was fully briefed on the merits in the Alabama Supreme Court and was fairly included in the due process claim as it was raised beginning with Life of Georgia's Answer. *See* Pet. App. at 176a-178a; Opp. App. at 2-4, 6.

4. Respondent makes no argument whatsoever on the merits of Question 2 (extraterritoriality) of the Petition. With regard to Question 3 (duplicative punishment), respondent says only that this case is not a "mass tort" as are the cases cited in the Petition. *See* Opp. at 20. It is interesting that respondent concedes that Life of Georgia has not committed a "mass tort," in light of her explicit claims at trial regarding an illegal pattern of fraud. Nevertheless, the underlying and operative fact is that Life of Georgia was punished twice for the same conduct,

---

[1] Similarly, Life of Georgia had no obligation to object to the trial court's oral charge to the jury in order to preserve its due process claim. *See* Opp. at 21-22.

precisely the issue that vexed the lower courts in the cases cited in the Petition. *See* Pet. at 17 & n.7. Thus, this case squarely presents the important issue of the constitutionality of duplicative punishment.

Finally, respondent resists plenary review of the constitutionality of the Alabama punitive damage system on the ground that the Alabama legislature and Alabama Supreme Court have taken steps to try to improve the system. *See* Opp. at 22-23. The woeful reality -- which respondent does not dispute -- is that despite minor changes in the Alabama procedures, the system does not provide defendants with "fair notice . . . of the severity of the penalty," *BMW*, 116 S. Ct. at 1598, that Alabama may impose to punish any given conduct. Respondent makes no attempt to show how the Alabama system as it currently exists provides such notice. In any event, to the extent that the Alabama Supreme Court might recognize that Alabama procedures are inadequate, that Court did not provide Life of Georgia with the benefit of any means designed to correct those shortcomings. This case provides the opportunity for this Court to announce clear, objective and definite procedural standards that restrict the imposition of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either remanded for further consideration by the Alabama Supreme Court in light of *BMW* or set for plenary consideration.

September 13, 1996

Respectfully submitted,

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